86-377

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1986

ALPHONSO CARVAJAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION OF A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment guarantees representation by an attorney who is admitted to practice in the jurisdiction in which the case is pending.

2. Whether the Fifth Amendment right to due process of law and the Sixth Amendment right to effective assistance of counsel require a knowing waiver of that guarantee.

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No. _____

In the Supreme Court of the United States

October Term, 1986

ALPHONSO CARVAJAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Alfonso Carvajal petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A, infra, 59-102) was filed on March 18, 1986. The Order of the Court of Appeals (App. A, infra, 120) denying the petition for a rehearing and suggestion for a rehearing en banc was unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1986. On July 7, 1986, the Court of Appeals denied the petitioner's Motion for a rehearing and suggestion for rehearing en banc. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT

Issues

This case presents significant and unresolved constitutional questions regarding whether the Sixth Amendment right to effective assistance of counsel guarantees representation by an attorney licensed to practice in the jurisdiction in which a case is pending and whether a defendant's Fifth Amendment right to due process of law and Sixth Amendment right to effective assistance of counsel requires a knowing waiver of that right.

Specifically, this case raises the question of (1) whether petitioner's Sixth Amendment right to counsel was violated when he was unwittingly represented at trial by an attorney who had been permanently disbarred from practice in the jurisdiction where the trial was held; (2) whether petitioner's Fifth and Sixth Amendment

rights were violated when the trial court, upon learning of his attorney's disbarment during the early stages of the trial, failed to personally advise him of that fact as well as its decision to permit his attorney to continue as counsel of record.

These issues were raised on appeal. Two circuit judges voted to affirm petitioner's convictions. Circuit Judge Warren J. Ferguson dissented and voted to reverse the petitioner's convictions on the Fifth and Sixth Amendment violations set forth above.

Trial

On June 24, 1982, Alfonso Carvajal and 21 other co-defendants were charged in a multi-count indictment which alleged numerous violations of the laws prohibiting narcotics trafficking and money laundering. These charges included the allegation that the petitioner and his co-defendant, Barbara Mouzin, committed one of the most serious crimes in the Federal Code: engaging in a continuing criminal enterprise in violation of Title 18, U.S.C. Section 848.[1]

On March 8, 1983, the appellant and five other co-defendants began what was to be an eight week jury trial in the Central District of California before United States District Judge A. Wallace Tashima. On March 15, 1983, the District Court notified defense counsel for the petitioner that the Court of Appeals for the Ninth Circuit had permanently disbarred him for repeated instances of failing to effectively represent his clients.[2]

---

[1]This violation is one of the few crimes in the federal criminal code which requires imposition of a mandatory minimum sentence: at least ten years in prison without parole.

[2]The Ninth Circuit's decision disbarring the petitioner's counsel cited his "failing to meet deadlines, failing to prosecute an appeal, and tendering a bad check to a court reporter." *United States v.*

Despite the language of Local Rule 2.6.2 of the United States Court for the Central District of California,[3] the trial judge allowed the petitioner's trial counsel to continue his representation until the completion of the trial:

> "THE COURT: Now, have you received this order of March 15 in the Court of Appeals?
>
> MR. PALACIOS: Yes, your honor. I just got it. There is an attorney working on that case. He has been working on that case for my office for months.
>
> THE COURT: But this order disbars you from practicing in the Court of Appeals. I think you have an obligation to tell your client that at this point. The second thing is this: under our local rule 1(e)(2), you will be automatically disbarred from the bar of this court because you are disbarred from the Ninth Circuit. And so if you want to take some action, you are going to have to petition in some way or other to modify that order.
>
> MR. PALACIOS: I didn't know that.
>
> THE COURT: All I wanted to do was put on the record that I've discussed this with the chief judge of the District Court here, and he believes, like I do, that you should be allowed

Cortes-Carvajal, No. 82-1700 (9th Cir., March 15, 1983).

[3]Local Rule 2.6.2 of the United States District Court for the Central District of California provides: "Upon receipt of reliable information that a member of the bar of this court has been suspended or disbarred from practice by the order of any court or administrative agency, this court shall immediately impose a like order of suspension or disbarment. The attorney so suspended may make application to the Chief Judge for reinstatement by regularly noticed motion."

> to complete representation in this case. But I think you are under an obligation to talk to your client about it, to do something about this order if you think it is not proper, the Ninth Circuit Order. But if you take a look at Local Rule 1(e)(2) that says that in effect that if a member of this bar is disbarred by any other court in which he is admitted, then he automatically is disbarred from practice in this court. If you don't want to suffer that disability, it's your obligation to do something about it. But I wanted to inform you that you better do something about it if you think you have proper grounds. All right.
>
> MR. PALACIOS: Yes, sir. Thank you.
>
> (End of Side Bar discussion) (R.T., Vol. 7, pgs. 10-11; App. 57-58)[4]

Notwithstanding this discussion, Mr. Carvajal was never informed of his attorney's disbarment or the trial court's decision with respect to his continued representation at any time during the trial.[5]

After six additional weeks of trial, Mr. Carvajal was convicted and subsequently sentenced to 29 years in prison with a lifetime special parole. Since the imposition of sentence, he has been in custody at the Federal Penitentiary at Lompoc, California.

The Decision of the Court of Appeals

The majority held that the trial judge had the discretion to interpret Rule 2.6.2's call for "immediate disbarment"

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[4]"R.T." refers to the reporter's transcript prepared of the petitioner's trial.

[5]App. 77-78; 92.

to allow the petitioner's attorney to act as his counsel for an additional six weeks until the conclusion of the case. While the majority agreed that the requirement for immediate disbarment had a "salutary purpose," it nonetheless felt that the trial court's interpretation was necessary to avoid a "litigation disaster." (App. A, infra, 79) The majority went on to find that even if the trial court erred by not immediately disbarring petitioner's counsel, his continued representation did not render him ineffective within the meaning of the Sixth Amendment. The majority concluded that while "unquestionably" the petitioner's attorney should have told him about his disbarment so that he "then could have been heard as to his views," it felt that his failure to do so did not deprive Mr. Carvajal of his rights under the Fifth and Sixth Amendments. (App. A, infra, 80)

Circuit Judge Ferguson began his dissent by noting that the mandatory language of local rule 2.6.2 does not allow a trial judge the discretion to defer "immediate" disbarment for any reason. In any event, the majority had erroneously claimed that a mistrial would have been a "litigation disaster." The trial was not in its closing stages as the majority stated. In fact, the trial was in its beginning stages when the court confronted the question of Mr. Carvajal's representation. Therefore, little would have been lost in the way of judicial resources if a mistrial had been declared as to the petitioner.[6] (App. A, infra, 92) Finally, Circuit Judge Ferguson noted that "judicial conveniences should be a low priority when the right to counsel has been . . . thwarted." (App. A, infra, 102)

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[6]Indeed, as noted later in this petition, Mr. Carvajal could have ultimately been retried with other defendants who received mistrials on different grounds.

The dissent went on to point out that the majority had construed the Sixth Amendment right to effective assistance of counsel too narrowly in the petitioner's case. While the majority sought to analyze the petitioner's appeal as a narrow question of whether he received competent representation, the dissent noted that the Sixth Amendment not only guaranteed competent counsel but *also* the right to participate meaningfully in one's defense. *Farella v. California,* 422 U.S. 806, 819 (1975); see, *e.g., Cuyler v. Sullivan,* 446 U.S. 335, 346-50 (1980). The dissent therefore argued that the case did not revolve solely on whether petitioner's counsel performed "competently" within the meaning of the Sixth Amendment.[7] The dissent held that the trial attorney's refusal to disclose his disbarment to the petitioner created a conflict of interest which rendered his client's Sixth Amendment right to participate in his own defense "meaningless." (App. A, infra, 94)

The dissent also found a second, independent reason for reversing the petitioner's conviction. This involved the violation of his due process right to be present at every critical stage of the trial. See, *e.g., United States v. Gagnon,* 105 S.Ct. 1482, 1484 (1985); *Snyder v. Massachusetts,* 291 U.S. 97, 105-06 (1934); see also F.R.Cr.Proc. 43. The dissent held that the discussion between the trial court and defense counsel about his disbarment and his ability to continue as counsel of record qualified as a "critical stage" of trial. (App. A, infra, 99) While a violation of a defendant's right to be present does not automatically result in a reversal if his absence is "harmless beyond a reasonable doubt,"

---

[7]The dissent did note that even under this narrow standard of review, it would conclude that trial counsel's failure to inform his client of the disbarment constituted incompetence, especially in light of the District Court's order to do so. (App. A, infra, 96)

it is required where "societal interest in seeing that the forms of trial are preserved," demands it. *Badger v. Cardwell,* 587 F.2d 968, 978 (9th Cir. 1978). The dissent noted that a *per se* rule of reversal has been applied when the defendant is absent from the jury selection process because he has an absolute prerogative to exercise peremptory challenges. See, *e.g., United States v. Washington,* 705 F.2d 489, 497 (D.C. Cir. 1983). Since the petitioner had the absolute prerogative to dismiss his disbarred attorney, the dissent reasoned that his case warranted an automatic reversal as well since as his exclusion from the side bar conference between the trial judge and his defense counsel rendered him ignorant of his attorney's disbarment and the trial court's decision regarding it.

Reasons for Granting the Petition

The Court of Appeals holding that the Sixth Amendment was not violated by Petitioner's unwitting representation by disbarred attorney conflicts with decisions of other circuits and also constitutes a radical departure from those cases which guarantee the right of a defendant "to participate meaningfully in the defense, to make important decisions, to receive important information, and to a loyal attorney, free from a conflict of interest." *Cuyler v. Sullivan, supra,* 346-50 (1980).

The Ninth Circuit's opinion requiring a showing of actual prejudice as a condition to reversal when one is not represented by a licensed attorney conflicts with decisions in other circuits. The inherent violation of a Sixth Amendment which occurs when a person is represented by one who masquerades as a practicing attorney has prompted two circuits who have addressed this issue to reverse convictions without requiring *any*

showing of prejudice. *Solina v. United States,* 709 F.2d 160, 166-68 (2nd Cir. 1983) (reversing conviction despite overwhelming evidence of guilt); *Harrison v. United States,* 387 F.2d 203, 212 (D.C. Cir. 1967) rev'd on other grounds, 392 U.S. 219 (1968).

Even if a *per se* rule is rejected, the Ninth Circuit's opinion conflicts with the holding of other circuits in the area of Sixth Amendment guarantees in a second, important way. The majority held a claim of conflict between the trial counsel's interest in remaining in the case and the petitioner's interest in a vigorous defense was "speculative." Therefore, the petitioner was not deprived of his Sixth Amendment right to a loyal attorney. Yet, other circuits have recognized that an attorney whose loyalty is divided is not an attorney within the meaning of the Sixth Amendment. As the Court of Appeals reasoned in *United States v. Alvarez,* 580 F.2d 1251, 1256-57 (5th Cir. 1978):

> Unlike competency of representation where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself.

Moreover, inasmuch as the petitioner's attorney continued his representation at the district court's discretion (in the face of a rule requiring immediate "disbarment"), he had *substantial* motivation to refrain from any tactic which might cause the trial court to disclose *either* his disbarment to Mr. Carvajal or invoke the mandatory provisions of Local Rule 2.6.2. The existence of these actively competing interests (the

attorney's fear of disclosure or disbarment by the trial court versus the petitioner's interest in a lawyer that would vigorously represent his case) is certainly not a speculative conflict of interest.

The majority's reliance on *United States v. Hoffman,*[8] to reject the petitioner's conflict of interest claim is misplaced. In *Hoffman*, the client-defendant knew of the disbarment. *Id.* at 598, fn.2. Additionally, as the *Hoffman* opinion emphasized, the attorney was only suspended for a limited duration and not disbarred. Finally, Hoffman's counsel had not been suspended from practice until *after* his representation of the appellant.

Finally, even without reference to the "conflict of interest" question or whether this Court should resolve an apparent conflict among the circuits regarding the adoption of a *per se* rule of reversal, the Court of Appeal's decision to approve the trial court's failure to personally advise the petitioner of his attorney's disbarment and its decision to allow him to proceed violates its duty to determine whether a waiver of a constitutional right to effective assistance of counsel is knowing and voluntary.

It is the duty of the trial court to ascertain whether a waiver of the constitutional right to the assistance of competent counsel is made intelligently and voluntarily. *United States v. Duganovick,* 468 F.2d 182, 186 (9th Cir. 1973); see, *e.g., Badger v. Caldwell,* 587 F.2d 967, 972, N.3 (9th Cir. 1974).

To begin with, the opinion's attempt to claim that the trial court had the discretion to allow petitioner's trial counsel to complete the case flies in the face of the local rule (which requires "immediate" disbarment) as well as the facts of the case.

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[8]733 F.2d 596 (9th Cir.) *cert denied,* 105 S.Ct. 521 (1984).

There is nothing in the record to support the majority's explanation that the trial court *was* exercising its "discretion" because it was afraid of a "litigation disaster." The District Court simply allowed petitioner's counsel to continue his representation based upon a conversation with the Chief Judge. The substance of this conversation was never placed on the record. Moreover, the "litigation disaster" which would have allegedly been caused by adherence to the "literal" language of the local rule would have simply been a mistrial. As previously noted, the petitioner's trial was in its beginning and not closing stages of the trial. Additionally, the trial court was not reluctant to "plunge the trial into chaos" by declaring a mistrial on March 30, 1983, as to four *other* co-defendants in the very same trial when it decided that the jury had heard certain inadmissible evidence. Only one other co-defendant, Barbara Mouzin, remained on trial with Mr. Carvajal when the trial court considered on April 7 whether to allow petitioner's counsel to proceed. Clearly, Mr. Carvajal could have been retried with the others.

The Court of Appeals' dismissal of petitioner's right to be present at the sidebar conference, in which the disbarment was disclosed, seriously undercuts the Supreme Court's repeated affirmations that a defendant has the right to be present at any proceeding where his presence has a reasonably substantial relationship to the "fullness of his opportunity to defend the . . . charge." *Snyder v. Massachusetts, supra,* 105-06 (1974).

The Majority Opinion recognizes the importance of the discussion at sidebar; it wrote that "unquestionably" the petitioner should have been advised of his attorney's disbarment so that he "could have been heard as to his views." (App. A, infra, 80) Yet, the Opinion failed

to provide the petitioner any relief because it found that his ignorance caused him no prejudice. This requirement of prejudice creates a precedent which is contrary to those cases which require automatic reversals when a defendant is excluded from a portion of his trial where he can exercise a prerogative of constitutional dimension which could affect the conduct of his trial. For example, as the dissent noted, the Court of Apeals in *United States v. Washington, supra,* automatically reversed a conviction where the defendant was not permitted to participate in jury selection. Here, by close analogy, the petitioner was prevented from freely exercising his right to both competent counsel and counsel of his choice when the District Court excluded him from the sidebar discussion and failed to advise him of its decision during the ensuing six weeks of trial.[9]

If the decision below is allowed to stand, the result will be that the constitutional rights to be present at critical stages of a criminal proceeding as well as to be represented by competent, conflict-free counsel will

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[9]The court's duty to personally inquire of the petitioner as to whether he had been informed of his counsel's disbarment and to obtain a knowing and intelligent waiver arose when the court received the disbarment order. This duty became even more apparent when, later in the trial, defense counsel failed to comply with the court's order to timely submit a written motion on double-jeopardy grounds (R.T. 15/99-100) or submit a motion to dismiss count twenty-seven pursuant to Rule 29 of the Federal Rules of Criminal Procedure despite a court order on May 3, 1983 specifically extending the time in which he could do so. While it may be difficult to reconstruct a merit of these motions had trial counsel made them in a timely manner, his failure to even file them is the very same conduct that caused his disbarment in the Ninth Circuit and surely constituted further grounds for the district court to inquire as to whether or not Mr. Carvajal knew his attorney had been disbarred.

be seriously abridged. The Opinion's conclusion that the conviction should stand because the petitioner was not prejudiced by his ignorance is contrary to the facts of the case which show that the petitioner's counsel had a compelling motive to refrain from any tactic which might cause the court to disclose his disbarment to the petitioner or execute the local rules call for "immediate" disbarment.[10] Secondly, the Opinion is contrary to the automatic rule of reversal which has been adopted by many circuits where either information which is critical to the conduct of the defense is withheld from a defendant or a defendant is represented by an individual who is not licensed to practice law.

While prejudice is inherent in any case where a defendant is represented by an attorney who remains as counsel of record at the sufferance of the trial court, a *per se* rule of reversal would not be onerous under the facts of this case. Clearly, it would have taken the district court less than ten minutes out of an eight week trial to advise the petitioner of his trial counsel's disbarment and obtain either a waiver or declare a mistrial. As a consequence of the petitioner's ignorance, he is now serving a 29 year prison term having been unwittingly represented by an attorney who had been disbarred in the very jurisdiction where the case was tried.

---

[10]Indeed, no motions were filed by the petitioner's counsel during eight weeks of trial.

CONCLUSION

The Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL D. ABZUG,

Attorney for Petitioner,
ALFONSO CARVAJAL

APPENDIX

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Attorney for Defendant
FABIAN MORA

FILED

JUL 12 1 23 PM '83

CLERK U.S. DISTRICT COURT
CENTRAL DIST OF CALIF
BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ALPHONZO CARVAJAL Defendant.	Case No. 82-518-AWT NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant ALPHONZO CARVAJAL, by and through his attorney, Michael D. Abzug, hereby appeals his judgment of conviction, entered before the Honorable A. WALLACE TASHIMA on July 11, 1983, to the Ninth Circuit Court of Appeals

DATED this 11th day of July, 1983 at Los Angeles, California.

MICHAEL D. ABZUG

JOINT APPENDIX

Judge: JUDGE TASHIMA Case Filed: 06/24/82

Defendant:

D12 CARVAJAL, ALPHONZO

Dft ID: -11960

Pending counts:

CONSP TO COMMIT OFFENSES AGAINST U.S., 18:371 (1)
CONSP TO POSS W/INT TO DISTB & TO DISTB COCAINE, SCHED II DRUG., 21:846 (2-3)
AIDING & ABETTING TO 21:841, 18:2 (4-5)
AIDING & ABETTING TO 18:1952, 18:2 (21-22)
UNLAWFUL USE OF COMMUNICATION FAC., 21:843(B) (31)
UNLAWFUL USE OF COMMUNICATION FAC., 21:843(B) (33)
CONTINUING CRIMINAL ENTERPRISE, 21:848 (35)
CONSP TO COMMIT OFFENSES AGAINST U.S., 18:371 (S1)
CONSP TO POSS W/INT TO DISTB & TO DISTB SCHED II DRUG, COCAINE., 21:846 (S3)
AIDING & ABETTING TO 21:841, 18:2 (S4-S5)
AIDING & ABETTING TO 18:1952, 18:2 (S21-S22)
UNLAWFUL USE OF COMMUNICATION FAC., 21:843(B) (S31)
UNLAWFUL USE OF COMMUNICATION FAC., 21:843(B) (S33)
CONT CRIM ENTERPRISE., 21:848 (S35)
CONSP TO COMMIT OFFENSES AGAINST THE U.S., 18:371 (SS1)
CONSP TO POSS W/INT TO DISTB AND TO DISTB NARC DRUG CONTROLLED SUBST, 21:846 (SS3)
AIDING & ABETTING TO 21:841, 18:2 (SS5-SS7)

INTERSTATE AND FOREIGN TVL AND TRANSP IN AID OF RACKETEERING ENTERPRISE, AND AIDING AND ABETTING TO 18:1952., 18:1952,2 (SS17)
UNLAWFUL USE OF COMMUNICATION FAC., 21:843(B) (SS25)
CONTINUING CRIMINAL ENTERPRISE, 21:848 (SS27)

Offense Level (opening): FEL

Terminated counts:
CONSP TO POSS W/INT TO DISTB & TO DISTB SCHED II DRUG, COCAINE., 21:846 (S2)

CONSP TO POSS W/INT TO DISTB AND TO DISTB NARC DRUG CONTROLLED SUBST, 21:846 (SS2)

Disposition
(Count S2) Dismissed on court's motion (CRT RECONS AND ORDS MOT TO DISM CT 2 GRANTED.). 11/23/82
(Count SS2) Dismissed on govt's motion (ON MOT OF GVT, CT 2 (B) IS ORD DISMSD AS TO DFTS CARVAJAL & MOUZIN, ONLY.). 03/31/83

Offense Level (disposition): NONE

Defense Counsel:
ABZUG, MICHAEL
1900 AVENUE OF THE STARS, STE 2512
LOS ANGELES, CA 90067
(213) 278-4984

PROCEEDINGS

06/24/82	1	Filed indictment (MAGISTRATE PENNE) (Dkt'd 07/01/82).
		Order cash appearance bail set in the amount of $20,000,000.00 (MAGISTRATE PENNE) (Dkt'd 07/01/82).
		Bench warrant issued (MAGISTRATE PENNE) (Dkt'd 07/01/82).
	12	- FLD CR-72 BY AUSA PERRY. (Dkt'd 07/01/82).
	14	Motion filed (MOT#1) (GVT FLD EXPARTE APP TO SEAL INDICT, DECLARATION OF ROBERT J. PERRY.) (Dkt'd 07/01/82).
	15	Motion granted (MOT#1) (FLD ORDER THAT INDICT IN CASE SHALL REMAIN SEALED UNTIL SUCH TIME AS ONE OF THE DFT'S IS ARRESTED.) (MAGISTRATE PENNE) (Dkt'd 07/01/82).
	15	- CASE UNSEALED ON 6/30/82, UPON ARREST OF DFT'S CARVAJAL & WARREN ON 6/29/82 BY S.A. JOSEPH E. ROWLAND. (K. SCHMIDGALL) (Dkt'd 07/01/82).
06/29/82		Defendant arrested (Dkt'd 07/01/82).
06/30/82		Defendant's first appearance (Dkt'd 07/02/82).
	17	Arraignment held (Counts 1-5,21-22,31,33,35) (DFT ARRGND & STATES T/N AS CHGD. ATTY A. CAPOZZALA RETAINED.) (MAGISTRATE REICHMANN) (Dkt'd 07/01/82).
	17	Order bail reduced to $3,000,000.00 (A/B, W/10% DEP, W/SUR TO JUST, W/INT PSA, TVL REST TO L.A. CNTY,

NEBBIA HEARING.) (MAGISTRATE REICHMANN) (Dkt'd 07/01/82).

17 Arraignment and plea contined to 07/06/82 @ 8:30 AM (Counts 1-5,21-22,31,33,35) (BEFORE MAGISTRATE TASSOPULOS. RE: P/I ARRGN.) (MAGISTRATE REICHMANN) (Dkt'd 07/01/82).

07/01/82 21 Motion filed (MOT#3) (FLD GVT'S MOT FOR RECONSIDERATION OF CRT ORD RED BAIL & REQ TO INCR BAIL, MEMO OF P & A, DECLARATIONSL OF RBT J. PERRY & HENRY B. MORGAN. RTNBL 7/2/82 @ 2:00 PM.) (Dkt'd 07/08/82).

07/06/82 22 Arraignment held (Counts 1-5,21-2,31,33,35) (DFTS ARRGND & STATE T/N AS CHGD.) (MAGISTRATE TASSOPULOS) (Dkt'd 07/08/82).

22 Arraignment and plea continued to 07/06/82 @ 4:30 PM (Counts 1-5,21-22,31,33,35) (MAGISTRATE TASSOPULOS) (Dkt'd 07/08/82).

22 Attorney SALCIDO, HENRY added to case (MAGISTRATE TASSOPULOS) (Dkt'd 07/08/82).

22 Order appointing attorney CAPOZZOLA, ANTHONY to represent defendant (MAGISTRATE TASSOPULOS) (Dkt'd 07/08/82).

23 Arraignment held (Counts 1-5,21-22,31,33,35) (ALL DFTS STATE T/N AS CHGD & ARE ARRGND. ALL DFTS ENTR PLEA.) (JUDGE TASHIMA) (Dkt'd 07/08/82).

23 Defendant enters plea of not guilty (Counts 1-5,21-22,31,33,35) (ALL DFTS ENTR

		N/G PLEAS TO CTS AS CHGD.) (JUDGE TASHIMA) (Dkt'd 07/08/82).
	23	Trial date set for 10/05/82 :30 AM (Counts 1-5, 21-22, 31, 33, 35) (CNSL ARE INST TO MMET & CONFR W/AUSA W/ IN 20 DAYS TO DISCUSS DISCV. IF THERE ARE ANY PROBS, CNSL SHALL FILE A JOINT RPT ON WHAT MATTERS ARE AGREED TO & WHAT DISCOV MATTERS THAT REMAIN TO BE RESOLVED BY 7/ 26/82.) (JUDGE TASHIMA) (Dkt'd 07/ 08/82).
	23	Status hearing set for 08/16/82 :30 PM (RE: STATUS CONFR.) (JUDGE TASHIMA) (Dkt'd 07/08/82).
07/08/82	24	Filed superseding indictment (FLD FIRST SUPERSEDING INDICT.) (Dkt'd 07/ 12/82).
	35	- FLD CR-72 BY AUSA PERRY. (Dkt'd 07/12/82).
07/09/82	44	Excludable delay from proceedings pursuant to 18 USC 3161 (h) 1 began on 07/ 06/82 and ended on 10/05/82 (MISC PROCEEDGS, PROB, DEPORTATION, EXTRADITION.) (JUDGE TASHIMA) (Dkt'd 07/12/82).
	44	Excludable delay while awaiting trial of co-defendant began on 07/06/82 and ended on 10/05/82 (DFT AWAITING TRIAL OF CO-DFT WHEN NO SEVERANCE HAS BEEN GRANTED 3161(H)(7).) (JUDGE TASHIMA) (Dkt'd 07/12/82).
07/21/82	57	Motion to withdraw as attorney filed (MOT#5) (ATTY CAPOZZULA FOR DFT FLD NOTC OF MOT & MOT TO WITHDRAW AS ATTY OF RECORD.

RTNBL 7/21/82 @ 1:30 PM.) (Dkt'd 07/22/82).

59 Motion to withdraw as attorney hearing held (MOT#5) (HRG MOT OF ATTY CAPOZZOLA TO BE RELIEVED AS CNSL OF REC. CRT & PARTIES CONFR. THERE BEING NO OBJ BY DFT OR GVT, CRT GRANS MOT & ORDS ATTY CAPOXXOLA RELIEVED AS CNSL OF REC. CRT FINDS ON BASIS OF FINANCIAL AFFID SUBM BY DFT HE APPEARS TO QUALIFY FOR APPTD CNSL UNDER THE CJA. CRT APPTS ATTY MAYOCK AS CNSL FOR DFT CARVAJAL. APPT OF CNSL FOR DFT IS MADE SUBJ TO AN ORDER FOR FULL OR PARTIAL REIMBURSEMENT FOR ATTYS FEES.) (JUDGE TASHIMA) (Dkt'd 07/23/82).

59 Attorney SALCIDO, HENRY deleted from case (JUDGE TASHIMA) (Dkt'd 07/23/82).

59 Attorney CAPOZZOLA, ANTHONY deleted from case (JUDGE TASHIMA) (Dkt'd 07/23/82).

59 Order appointing attorney MAYOCK, W MICHAEL to represent defendant (JUDGE TASHIMA) (Dkt'd 07/23/82).

60 Motion to withdraw as attorney granted (MOT#5) (FLD ORDER ALLOWING WITHDRAWAL OF ATTY OF REC. CRT ORD MOT OF ATTY CAPOZZOLA TO WITHDRAW AS ATTY OF REC IN CASE IS GRANTED & ATTY MAYOCK IS APPTD UNDER THE CJA AS ATTY FOR DFT, SUBJ TO ORDER OF REIMBURSEMENT,

UNTIL FUR ORD OF CRT.) (JUDGE TASHIMA) (Dkt'd 07/23/82).

07/27/82 68 - GVT FLD GVT'S STATEMENT REGARDING DISCOVERY. (Dkt'd 07/28/82).

08/04/82 77 Order filed (FLD CRT ORDER, UPON EX PARTE APP BY GVT, IT IS HEREBY ORD ANY & ALL PLEADINGS & ORDS IN MATTERS DESIGNATED CDCA MISC NUMBERS 11396 & 11469 SHALL BE UNSEALED.) (JUDGE GRAY) (Dkt'd 08/09/82).

08/05/82 78 Attorney MAYOCK, W MICHAEL deleted from case (FLD SUBST OF ATTY. ATTY GILLINGHAM IN PLACE OF ATTY MAYOCK.) (JUDGE LUCAS) (Dkt'd 08/09/82).

78 Filed substitution of GILLINGHAM, HOWARD as attorney for defendant (FLD SUBST OF ATTY.) (JUDGE LUCAS) (Dkt'd 08/09/82).

08/16/82 88 Status hearing held (CRT & CNSL CONFR. CRT GRANTS DFT CANTELLI TO 8/23/82 TO FILE HIS MOT FOR BILL OF PARTICULARS. CRT INSTRUCTS ALL CNSL TO FILE WVRS OF DFT'S PRESENCE IF NEEDED. AT REQUEST OF CNSL, CRT ORD ALL CNSL IN ACTION ARE AUTHORIZED TO BRING TAPE RECORDS INTO BLDG FOR USE IN THIS CASE TO MONITOR TAPES FURNISHED BY GVT IN THE DISCVY ROOM SET UP IN U.S. ATTY'S OFFICES.) (JUDGE

TASHIMA) (Dkt'd 08/18/82).

88 - DISCOV MOT TO BE FLD BY: 8/30/82, ALL OTHERS BY: 9/15/82. GVT'S OPP TO DISCOV MOTS TO BE FLD BY 9/3/82, ALL OTHERS BY: 9/29/82. HRG ON DISCOV MOTS SET FOR: 9/13/82 @ 1:30 PM, HRG ON OTHER MOTS SET FOR: 10/4/82 @ 2:00 PM. (JUDGE TASHIMA) (Dkt'd 08/18/82).

08/23/82 101 Order filed (FLD ORD RE: PRISON ATTY VISITTS AND CAMERA ACCESS) (JUDGE TASHIMA) (Dkt'd 08/24/82).

102 Status hearing held (CRT PARTIALLY GRANTS DFT'S APPLIC. APPLIC FOR ORD RE ATTY VISITATION AND CAMERA ACCESS) (JUDGE TASHIMA) (Dkt'd 08/24/82).

09/07/82 138 - FLD DFT'S NTC OF MOTN FOR DISCVRY (Dkt'd 09/08/82).

139 Motion for discovery/inspection filed (MOT#23) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD MOTION FOR DISCVRY (DFT'S MOTIONS)) (Dkt'd 09/08/82).

140 Filed memorandum in support of motion for discovery/inspection (MOT#23) (FLD MEMO P/A IN SUPPORT OF MOTN FOR DISCVRY) (Dkt'd 09/08/82).

09/09/82 143 - FLD GVT'S RESPONSE TO DFTS' MOTN FOR DISCVRY, DECLARATION, EXHIBIT. RETNB 9/13/82 @ 1:30PM (Dkt'd 09/10/82).

09/13/82 150 Status hearing held (STAT HRG HELD. BARRY TARLOW RELIEVED AS SPECIAL CNSL FOR BARBARA MOUZIN AND ANTHONY CAPPOZOLA. ANTHONY CAPPOZOLA ORALLY MOVES TO W/DRAW AS CNSL OF RECORD FOR DFT BARBARA MOUZIN, GRANTED. ATTY PAUL CARUSO APPEARS SPECIALLY TO REPRESENT ATTY ANTHONY CAPPOZOLA. DISCVRY MOTN FLD BY BARRY TARLOW ON BEHALF OF ATTY ANTHONY CAPPOZOLA W/DRAWN. CRT ORD ALL DISCVRY MOTNS TAKEN UNDER SUBMISSION CNSL ARE INSTRUCTED TO FILE AND SERVE W/IN 3 DAYS A STATMNT OF WILLINGNESS TO GRANT RECEIPTOCAL DISCVRY. CRT FUR ORD ALL MOTNS FOR B/P TAKEN UNDER SUBMISSION. CRT RE-SET BRIEFING SCHED FOR MOTIONS. ALL MOTNS ARE TO BE FLD AND SERVED BY 10/18/82 AND SET FOR HEARG ON 11/15/82 @ 2:00PM. GOVT'S OPPOS SHALL BE FLD AND SERVED BY 11/1/82 W/ANY REPLIES FLD AND SERVED BY 11/8/82. CRT FUR ORD TRIAL DATE CONT TO 11/30/82 @ 9:30AM. CRT FUR ORD THAT ALL TRANSCRIPTS OF ALL SIDE BAR CONFERENCES SHALL BE UNDER SEAL UNTIL FUR ORD OF THE CRT) (JUDGE TASHIMA) (Dkt'd 09/14/82).

150 Status hearing continued to 11/15/82 @ 2:00 PM (FOR HRG ON VARIOUS MOTIONS) (JUDGE TASHIMA) (Dkt'd 09/14/82).

150 Trial date set for 11/30/82 @ 9:30 AM (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (JUDGE TASHIMA) (Dkt'd 09/14/82).

09/21/82 159 - FLD GOVT'S NTC OF INTENTION TO USE EVIDENCE (Dkt'd 09/21/82).

09/29/82 173 Order filed (FLD FINDINGS AND ORD RE EXCLUDABLE TIME.) (JUDGE TASHIMA) (Dkt'd 10/04/82).

10/01/82 171 Joinder in Motion for discovery/inspection (MOT#22) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for discovery/inspection (MOT#16) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for a bill of particulars (MOT#17) (Counts 1-5,21-22,31,33,35,S1-S5,S21 S22,S31,S33,S35) FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion (MOT#9) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for a bill of particulars (MOT#10) (Counts 1-5,21-22,31,33,35,S1-S5,S21-

S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for discovery/inspection (MOT#11) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (DFT DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for discovery/inspection (MOT#21) (Counts 1-5, 21-22, 31, 33, 35, S1-S5, S21-S22, S31, S33, S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion to suppress evidence (MOTT#24) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for a bill of particulars (MOT#18) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for a bill of particulars (MOT#19) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for discovery/inspection (MOT#20) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion (MOT#8) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for a bill of particulars (MOT#12) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion (MOT#13) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion (MOT#14) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

171 Joinder in Motion for discovery/inspection (MOT#15) (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (FLD DFT'S JOINDER IN PRETRIAL MOTNS) (Dkt'd 10/01/82).

174 Excludable delay based on finding the ends of justice served by continuance began on 06/24/82 and ended on 11/30/82 (NUNC PRO TUNC AS OF 9/29/82. EXCLUD IN RE: 3161(H)(1), 3161(H)(7), 3161(H)(8).) (JUDGE TASHIMA) (Dkt'd 10/04/82).

176 Motion for discovery/inspection granted in part: denied in part (MOT#23) (NUNC PRO TUNC AS OF 9/29/82. FLD DISCOV ORD. "TO THE EXT NOT GR HEREIN BY THE PROV OF THIS DISCOV ORD, THE VAR MOTS OF INDIV DFTS FOR FUR DISCOV IS DENIED.") (JUDGE TASHIMA) (Dkt'd 10/04/82).

10/07/82 180 - FLD GVT'S BILL OF PARTICULARS (Dkt'd 10/12/82).

10/14/82 184 - DEFTS FLD EX PARTE APP FOR ORD SHORTEING TIME IN WHICH TO FILE AND HEAR MOTS, DECLARATION OF ALVIN S. MICHAELSON. (Dkt'd 10/19/82).

10/15/82 185 Order filed (FLD ORD ON EX PARTE APP TO SHORTEN TIME. CRT ORD THAT SUBJ MOTS SHALL BE FLD FORTHWITH & SET FOR HRG ON 11/8/82, @ 3:00 PM. GVT'S OPP FLD AND SVD NLT 10/24/82, REPLY SHALL BE FLD & SVD NLT 11/1/82.) (JUDGE TASHIMA) (Dkt'd 10/19/82).

198 Motion to dismiss filed (MOT#30) (Counts 1-5, 21-22, 31, 33, 35, S1-S5, S21-S22, S31, S33, S35) (DFT FLD NOTC OF MOT AND MOT FOR DISMSL OF INDICT PURS 18:3161, MEMO OF P & A. RTNBL 11/8/82 @ 3:00 PM.) (Dkt'd 10/19/82).

10/22/82 232 - GVT FLD OPP TO DFT'S MOTS REGARDING THE SPEEDY TRIAL ACT, ARGUMENT, RTNBL 11/8/82 @ 3:00 PM. (Dkt'd 10/25/82).

11/01/82 244 - FLD GVT'S EXHIBITS IN RESPONSE TO DEFENSE MOTIONS, RTNBL 11/15/82 @ 2:00 PM. (Dkt'd 11/08/82).

11/08/82 275 Status hearing held (HRG DFTS' MOTN FORTHWITH RELEASE AND FOR ORD DISMISSING INDICT. CRT ORD MOTNS DENIED) (JUDGE TASHIMA) (Dkt'd 11/19/82).

11/15/82 279 - FLD GOVT'S APPLICATION FOR IMMUNITY FOR FERMEEN DAVILA PURS TO 18:6001, ET SEQ, DECLARATION OF STEPHEN S. TROTT, EXHIBIT (Dkt'd 11/19/82).

280 Order filed (FLD ORD THAT NO TESTIMONY OR OTHER INFO COMPELLED UNDER THIS ORD SHALL BE SUED AGAINST FERMEEN DAVILA IN ANY CRIMINAL CASE, EXCEPT THAT FERMEEN DAVILA SHALL NOT BE EXEMPTED BY THIS ORD FROM PROSECUTION OF PERJURY, GIVING A FALSE STATMNT, OR OTHER WISE FAILING TO COMPLY W/) (JUDGE TASHIMA) (Dkt'd 11/19/82).

293 Status hearing held (HRG RE: MOT OF DFTS. CNSL PRES ORAL ARGUMNTS. DFT PSASLODOS JOINS IN DFT CARVAJAL'S MOTS W/CRT'S APPVL. CRT HRS TEST FRM F. DAVILA, CST, RE: GVT'S MOT TO INCR BAIL. EXH 1,2,4 ARE MDK AND ADM. CRT ORDS BAIL AS TO DFT PASALODOS INCRD TO $1,000,000. CRT HRS TEST OF D. SMITH, CST W/REGARD TO MOT TO SUPPRESS EVID. CRT MKS FOLLOWING ORDS W/REGARDS TO PENDING MOTS: DFT PSASLODOS' MOT FOR DISCL OF EVID, TO DISM CT 2 AND MOT 43 TO PERM INSPECT OF G/J TEST ARE ORD DENIED. DFT PSASLODOS' MOT 42 TO SUPPRESS IS ORD DENIED IN PART AND TKN UNDER SUBM IN

PART. DFT PASALODOS' MOTS 36,37,40 ARE CONTD. DFT PSASLODOS' MOT TO SEVER IS TKN UNDER SUBM. DFT HACKETT'S MOT TO DISM IS ORD DENIED. DFT HACKETT'S MOT REGARDING RIGHT TO CNSL IS ORD DENIED. DFT CANTLLI AND MR C'S MOTS 46 AND 49 NARROWED IN CRT BY CNSL TO CTS 2 AND 20 ARE ORD DENIED. DFT CANTELLI AND MR C'S MOT 48 PARTIALLY WITHDRAWN W/RESPECTS TO CONT BUT TKN UNDER SBUM W/ REGARD TO PORTION THAT GVT SHLD BEAR CERTAIN DEFENSE COSTS. DFT CANTELLI AND MR C'S MOT 50 TO DISM TKN UNDER SUBMISSION. DFT CANTELLI AND MR C'S MOT TO SEVER TKN UNDER SUBM. DFT WARREN'S MOT TO SUPPRESS ORD DENIED. DFT WARREN'S MOT 58 TO EXCLUDE CO-CONSPIRATORS ORD CONTD. DFT ADELMAN'S MOT 44 AND 45 TO SUPPRESS ORD DENIED. DFT CASTANO'S MOT 53 AND 55 TO SUPPRES ORD DENIED SUBJ TO RECONSIDERATION. DFT CASTANO'S MOT 52 FOR PRETRIAL DISCLOSURE ORD CONTD. DFT CASTANO'S MOT 54 TO SEVER TKN UNDER SUBM. DFT MOUUZIN'S MOT TO SEVER TKN UNDER SUBM. CRT ORDS FUR STAT CONFR SHALL BE HLD. ATTYS R. BLOCK, P. BENSON APPEARED ALSO ON BEHALF OF DFTS CAN-

TELLI AND MR. C.) (JUDGE TASHIMA) (Dkt'd 12/03/82).

293 Status hearing continued to 11/23/82 @ 3:00 PM (RE: FUR HRG ON DFT'S MOTS.) (JUDGE TASHIMA) (Dkt'd 12/03/82)

11/19/82 423 Order filed ((MIN ORD OF 2/15/82 NUNC PRO TUNC AS OF 11/19/82) CRT HLD IN CHAMBERS AN EX PARTE PROCEEDG W/O PRESENCE OF DFT OR THEIR CNSL. CRT INSTRUCTED CRT REPORTER TO PLACE HIS NOTES "UNDER SEAL.") (JUDGE TASHIMA) (Dkt'd 01/11/82).

11/12/82 298 Status hearing held (DFT CASTANO RENEWS MOT TO SUPPRESS W/ CRT APPVS. J. CMCLAIN, G. BRICKER CST. DFT CASTANO'S EXH 101 TO 105 MKD AND AMD. CRT ORD DFT CASTANO'S RENEWED MOT TO SUPPRESS DENIED. DFT MOUZIN'S MOT TO CON TRIAL ORD GRANTED AFT HRG ARGU. CRT ORDS TRIAL CONTD. CNSL ARGU GVT'S MOT TO INCR BAIL AS TO DFT CASTANO. W. R. OLSEN CST. GVT'S EXH 1,2,3 MKD FOR IDENT. CRT ORDS MOT TO INCR BAIL DENIED. CRT INDICATES PROP POSTED AND JUST BY W. OLSEN IS ACCEPTABEL AFT BRIEF NEBBIA HRG. W/REGARD TO PENDG MOTS TO DISM CTS 6-16, CRT ORDS MOT TO DISM GRANTED AS TO CT 6, DENIED AS TO CTS 7-16. MR. C'S

AND MR CANTELLI'S MOT FOR REIMBURSEMENT OF EXPENSES IS ORD DENIED. CRT FUR ORDS THAT PORT OF DFT PASALOSOS' MOT TO SUPPRES AS TO BRIEF-CASES DENIED. CRT RECONSID-ERS AND ORDS MOTS TO DISM CT 2 GRANTED. CRT FUR ORDS THE MOTS TO SEVER GRANTED IN THAT THE CRT ORDS CTS 1,7-19 AND 21-24 SEVERED FOR TRIAL FRM 3-5,20,25-35. A FUR HRG RE: THE REMAINING MOTS AND STAUS CONFR IS SET.) (JUDGE TASHIMA) (Dkt'd 12/03/82).

298 Dismissed on court's motion (Count S2) (CRT RECONS AND ORDS MOT TO DISM CT 2 GRANTED.) (JUDGE TASHIMA) (Dkt'd 12/06/82).

298 Trial date continued to 12/14/82 @ 9:30 AM (Counts 1-5,21-22,31,33,35,S1-S5,S21-S22,S31,S33,S35) (CRT ORD TRIAL CONTD.) (JUDGE TASHIMA) (Dkt'd 12/06/82).

12/02/82 300 Filed superseding indictment (FLD SECOND (C) SUPERSEDING INDICT.) (MAGISTRATE GEFFEN) (Dkt'd 12/06/82).

308 - FLD CR-72 BY AUSA PERRY. (Dkt'd 12/06/82).

298 Status hearing set for 12/06/82 @ 2:30 PM (RE: FUR HRG RE: RMNG MOTS AND STAT CONFR. (NUNC PRO TUNC 11/23/82)) (JUDGE TASHIMA) (Dkt'd 12/06/82).

12/06/82 317 Status hearing held (STAT CONF AND FUR HRG RF MOTS. CRT AND

CNSL CONFR. CRT ORDS DISCOV ORD OF 9/29/82 TO RMN IN EFFECT FOR THE SECOND SUPERSEDING INDICT. CRT INSTRUCTS GVT TO MK THE G/J TRANSC AVAILABLE TO DEFENSE CNSL NLT THAN 12/13/82. ALL FUR PRETRIAL MOTS ARE TO BE FLD NLT 12/27/82 AND SET FOR HRG ON 1/10/83 AT 2:30 PM. OPP TO MOS SHALL BE FLD NLT 1/3/83 AND REPLY NLT 1/6/83. TRIAL DATE AS TO ALL DFTS NMD IN THE SECOND SUPERSEDING INDICT IS ORD CONTD TO 1/25/83 AT 9:30 AM. ARRGN OF ALL RMNG DFTS ON SECOND SUPERSEDING INDICT SHALL TAKE PL ON THE MRNG OF TRIAL. DFT MOUZIN'S ORAL MOT TO DISM ALL THE UNDERLYING INDICT AND CTS IS ORD DENIED. CNSL ARGU DFT SCHUSTER'S MOT FOR MOD OF CONDTNS OF REL. CRT ORD SCHUSTER'S MOT FOR MOD DENIED. DFT PASALODOS' MOT TO DISM THE FIRST SUPRSEDING INDICT (MOT FLD THIS DATE) IS DEEMED MOOT.) (JUDGE TASHIMA) (Dkt'd 12/09/82).

317 Status hearing set for 01/10/83 @ 2:30 PM (MOT TO BE FLD NLT 12/27/82, OPP NLT 1/3/83, RELPY NLT 1/6/83.) (JUDGE TASHIMA) (Dkt'd 12/09/82).

317 Trial date continued to 01/25/83 @ 9:30 AM (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (ARRGN OD

DFTS ON 2ND SUPERSEDING INDICT TO TK PL ON MORNING OF TRIAL.) (JUDGE TASHIMA) (Dkt'd 12/09/82).

12/19/82 321 Filed transcript of proceedings for 11/15/82 (Dkt'd 12/27/82).

12/20/82 320 Filed transcript of proceedings for 11/23/82 (Dkt'd 12/27/82).

322 Filed transcript of proceedings for 12/06/82 (Dkt'd 12/27/82).O 8/23/82

Trial date stricken (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (Dkt'd 12/30/82).

Trial date set for 01/25/83 @ 9:30 AM (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (Dkt'd 12/30/82).

01/03/83 357 — FLD GVT'S SECOND IN CAMERA SUBMISSION (UNDER SEAL) (LDG IN CAMERA). (Dkt'd 01/07/83).

01/05/83 371 — FLD GVT'S BILL OF PARTICULARS. (Dkt'd 01/10/83).

373 — FLD GVT'S EXHIBITS IN RESPONSE TO DFT'S MOTIONS FOR DISMISSAL OF SECOND SUPERSEDING INDICT FOR PROSECUTORIAL MISCONDUCT. RTNBL 1/10/83 @ 2:30 PM. (EXHIBITS ATTACHED TO JUDGE'S COPY). (Dkt'd 01/10/83).

01/10/83 385 — RECVD MEMORANDUM FRM DFT'S CNSL STATING: DFT DOES NOT WISH TO WV APPEARANCE DRG ANY STAGE OF CRIM PRO-

CEEDGS HEREIN, AND SPEC NOT FOR DATE SET TO HER MOTS OF 1/10/83. DFT IS ENROUTE TO FT. LAUDERDATE, FLA TO STAND TRIAL ON A RELATED MATTER. DFT IS IN CUSTODY. (Dkt'd 01/18/83).

387 Status hearing held (HRG ON MOTS. GVT AND DFT SAMUEL SCHUSTER REQUEST AN IN CAMERA HRG, GRANTED. CRT HRS MOT IN LIMINE TO EXCLUDE EVID AT TRIAL IN CHAMBERS. CRT ORD MOT DENIED. DFT SCHUSTER'S ORAL MOT TO SEVER DENIED. DFT MOUZIN'S MOT TO DISM CTS 1,8-12 & 28 ON BASIS THAT SHE IS NOT A FINANCIAL INST IS DENIED. DFT MOUZIN'S MOT FOR DISCOV DENIED. DFT MR. C AND CANTELLI'S MOT FOR COSTS DENIED. DFTS MOUZIN, MR C & CANETELLI'S MOT TO DISM CT 2 OR IN THE ALTN TO COMPEL GVT TO ELECT BETW CT 1 AND CT 2 IS ORD DENIED. DFT PASALODOS' MOT TO SUPPRESS RE COMPUTERS IS ORD DENIED. MOTS TO DISM FOR VINDICTIVE PROSEC BY DFT MOUZIN, MR C CANTELLI AND HACKETT ORD DENIED AFT ARGUMENTS HRD. CNSL ARGU MOT BY DFT MR. C, CANTELLI, MOUZIN AND PASALODOS TO DISM FOR PROSECUTORIAL MISCONDUCT, INSUFFICIENCY OF EVIDENCE AND ABUSE OF G/J PROCESS. CRT TKS THIS MOT

UNDER SUBM. ALL OTHER MOS AND MOTS TKN UNDER SUBMISSION CONTD. THE GRANTING OR DENIAL OF ANY MOT MK BY A PART SHALL ALSO BE THE ORD OF THE CRT W/REGARD TO ANY JOINDER TO THE MOT FLD BY ANY OTHER PARTY.) (JUDGE TASHIMA) (Dkt'd 01/18/83).

387 Status hearing continued to 01/11/83 @ 10:30 AM (JUDGE TASHIMA) (Dkt'd 01/18/83).

01/11/83 388 Status hearing held (HRG ON MOTS. CRT HRS ARGU FRM CNSL RE PENDG MOTS. CRT ORD: RE DFT PASALODOS — MOT TO DISM 2ND SUPERS INDICT FOR ABUST OF G/J DENIED, MOT TO COMPEL ELECT BETW CTS AND TO DISM RMNG 2 CTS DENIED, DFT'S MOT TO STRIKE SURPLUSAGE DENIED, DFT'S MOT FOR B/P GRANTED IN APRT AND DENIED IN PART. DFT'S MOT TO INCR CHALL GRANTED. CRT ORD THAT ALL DFTS ARE GRANTED 6 JOINT CHALLENGES AND 3 INDIV CHALL WILL BE PERM FOR EA DFNS CNSL. GVT SHALL BE GRANTED A MAX OF 15 CHALLENGES OR 50% OF THE NUMBER OF CHALLL PERM THE DEF, IF LESS THAN THE PRES NUMBER OF DEFT GO ON TO TRIAL. FOUR ALTN JURORS WILL BE SEL AND THE DE3F IS GR 4 HOINT CHALL. GVT IS GRANTED 2 CHALLENGES

FOR THE ALTERN JURORS. RE DFT HACKETT — DFT'S MOT TO DISM FOR VINDICTIVE PROSEC DENIED. RE DFT WARREN — DFT W/D MOT TO SUPPRESS EVID FRM CO CONSPIRATOR'S. RE DFTS CANTELLI AND MR C — DFT'S MOT TO DISM CTS 2,8,9,10, ETC FOR PROSEC MISCONDUCT DENIED. DFT'S MOT TO STRIKE CTS 8-16 & 28 FOR INSUFFI-CIENT'CY OF EVID DENIED. DFT'S MOT TO DISM OR IN THE ALTN TO SEV DENIED. DFT'S MOT TO STRIKE PORTS OF 2ND SUPERS AS PREJUDICED AND INFLAMM SUR-PLUSAGE DENIED. DFT'S MOT TO COMPEL GVT TO ELEC BETW CTS 8,9,10,11,12 OR IN THE ALTN TO STRIKE CERT LANGUAGE FRM CTS 8-12 DENIED. DFT'S MOT TO BIRFURCATE TRIAL DENIED. DFT'S MOT TO DISM CTS 8-12 GR IN PART AND DENIED W RE DFT MOUZIN — DFT'S MOT TO DISM CTS 8-12 GR IN PART AND DN W RE DFT CASTANO — DFT'S MOT FOR PRETRIAL DISCLOSURE OF EVID OF CONSP DENIED. THE GR OF DN OF ANY MOT MD BY A PARTY SHALL ALSO BE THE CRT'S ORD W CRT ORD HRG RE DFT PASOLODOS' MOT FOR VID HERG RE RELEVANCE OF DFT'S FINAN-CIAL CONDTN AND DFT'S MOT TO ALLOW CNSL TO VOIR DIRE THE JURY CONTD. CNSL ARE INSTRUCTED TO SUBM ALL PRO-

POSED VOIR DIRE QUESTIONS.) (JUDGE TASHIMA) (Dkt'd 01/18/83).

01/18/83 393 —FLD GVT'S REQUESTED VOIR DIRE. (Dkt'd 01/24/83).

395 Trial date continued to 02/22/83 @ 9:30 AM (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (JUDGE TASHIMA) (Dkt'd 01/24/83).

395 Status heraing set for 02/14/83 @ 2:30 PM (RE: STAT CONFR AND MOT HRG.) (JUDGE TASHIMA) (Dkt'd 01/24/83).

01/19/83 396 Motion filed (MOT#114) (FLD GVT'S MOT FOR RECONSIDERATION OF THE CRT'W ORDER CONTINUING THE TRIAL DATE, DECLARATION OF ROBERT J. PERRY.) (Dkt'd on 01/24/83).

01/27/83 402 Filed transcript of proceedings for 01/10/83 (FLD RPTR'S TRANSC OF PROCEEDGS HLD 1/10/83 @ 1/11/83.) (Dkt'd 01/28/83).

02/10/83 415 — FLD GVT'S SECOND BILL OF PARTICULARS. (Dkt'd 01/17/83).

02/11/83 420 Order filed ((MINUTE ORDER) CRT HLD IN CHAMBERS AN EX PARTE PROCEEDGS W/O THE PRESENCE OF DFTS OR THEIR CNSL. CRT INSTRUCTED THE C/R TO PLC HER NOTES "UNDER SEAL]") (JUDGE TASHIMA) (Dkt'd 02/17/83).

02/16/83 424 Order filed ((IN CHAMBERS) CRT HLDS EX PARTE HRG IN CHAMBERS RE DISCLOSURE OF

DISCOV MATERIALS BY GVT TO CNSL. CRT INST C/R TO PL HER NOTES "UNDER SEAL.") (JUDGE TASHIMA) (Dkt'd 02/22/83).

02/17/83 427 — FLD GVT'S THIRD IN CAMERA SUBMISSION. (LODG IN CAMERA). (Dkt'd 02/22/83).

02/23/83 439 — STAT CONFR & HRG ON PENDG MOTS. CNSL PRES ARGUMENTS RE THEIR MOTS. DFT PASAOLO-DOS ORALLY MVS TO CONT TRIAL DATE, DENIED. DFT SCHUSTER'S MOT FOR PROD OF HANDWRIT-TEN NOTES BY GVT AGENT DENIE. IN PART AND RESERVED IN PART. DFT SCHUSTER'S MOT FOR BAIL RED ORD DENIED. CRT ORD STAT CONFR SET FOR 3/7/83 @ 3:30 PM. (JUDGE TASHIMA) (Dkt'd 03/03/83).

02/25/83 434 Excludable delay based on finding the ends of justice served by continuance began on 11/30/82 and ended on 03/08/83 (EXCLUDABLE TIME RE: PRE-TRIAL MOTS, FAILURE TO CONT WLD STOP FUR PROCEEDGS OR RESULT IN MISCARR OF JUST, CASE UNUSUAL OR OCMPLEX, CONT GR IN ORD TO OBTAIN OR SUBST CNSL, OR GV REASONABLE TIME TO PREP.) (JUDGE TASHIMA) (Dkt'd 02/28/83).

435 Order filed (CRT FLD SECOND FIND-INGS AND ORDER RE: EXCLUD-ABLE TIME.— (JUDGE TASHIMA) (Dkt'd 02/28/83).

02/28/83 439 Status hearing continued to 03/07/83 @

3:30 PM (NUNC PRO TUNC ORD 2/23/83 FOR CONT.) (JUDGE TASHIMA) (Dkt'd 03/03/83).

03/03/83 444 Filed trial memorandum (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (GVT FLD TRIAL MEMORANDUM.) (Dkt'd 03/08/83).

03/04/83 447 Status hearing held (HRG B. MOUZIN'S MOT TO DISM ON GRNDS OF OUTRAGEOUS CONDUCT AND OSCAR CANTANOS' MOT TO DISM AND MOT TO SEVER. A. MICHAELSON (ATTY) INFRMS CRT HE WILL BE APPEARING ON BEHALF OF DEFTS O. PASALODOS AND S. SCHUSTER FOR THIS PROCEEDG FOR ATTYS IVERSON & TAKIFF. REDACTED FORM OF AFFID OF MOUZIN PREV SUBM UNDER SEAL ORD FLD. DFT MOUZIN CLS THE FLLWG WITNESSES: MOUZIN, R. JACOBY, JR, RICHARD C. AARONSON, WM BAMMER, G. JAMES, M. L. ATKINSON, M. PERBETSKY, T.S. TUTTLE, JUDITH K. HOFFMAN, D. T. SHINTANI, J. ROLAND, S. ALTENSTADTER, H. V. MORGAN. EXH MKD. CRT ORD MATTER CONTD FOR FUR HRG. CRT ORD DFT CASTANO'S MOT TO UNSEAL ALL "UNDER SEAL" SUBMS REGARDING ATTY CAPOZZOLA DEFERRED FOR RULING UNTL 3/7/83. CRT FUR ORD DFT CASTANO'S MOT TO DISM ON

GRNDS OF OUTRAGEOUS CONDUCT DND IN PART AND DEFERRED IN PART.) (JUDGE TASHIMA) (Dkt'd 03/07/83).

447 Status hearing continued to 03/07/83 @ 9:00 AM (JUDGE TASHIMA) (Dkt'd 03/09/83).

534 Filed transcript of proceedings for 08/16/82 (FLD RPTR'S TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/05/83).

03/07/83 448 — FLD GVT'S FOURTH IN CAMERA SUBMISSION. (Dkt'd 03/09/83).

449 — FLD GVT'S PROPOSED SUMMARY OF INDICTMENT. (Dkt'd 03/09/83).

452 Status hearings held (EVID HRG ON DFT MOUZIN'S MOT TO DISM FOR OUTRAGEOUS CONDUCT. S.W. SWANSON, D. DIXON, R. DROOYAN, D. HACKETT, M. GLASSER, J. ADELMAN, W. COONCE, & GERALD SCOTTI C,S,T. PLTFF AND DFT REST. CRT ORD MATTER CONTD FOR ARGUMENT ON MOT. CRT APPTS H. PERREZ UNDER THE CRIM JUST ACT TO REP WITNESS GERALD V. SCOTTI. CRT ORD MOT TO SEVER AS TO DFT O. CASTANO DENIED.) (JUDGE TASHIMA) (Dkt'd 03/10/83).

452 Status continued to 03/08/83 @ 8:30 AM (JUDGE TASHIMA) (Dkt'd 03/10/83).

03/08/83 453 Defendant enters plea of not guilty (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S55,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (ASSUMED PLEA NOT GUILTY.)

(JUDGE TASHIMA) (Dkt'd 03/10/83).

453 Voir dire begins—jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (JUDGE TASHIMA) (Dkt'd 03/10/83).

453 Trial begins—jury (Counts 1,2-3,4-5,21-22,31,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (JUDGE TASHIMA) (Dkt'd 03/10/83).

453 Trial held—jury (Counts 1,2-3,4-5,21-22,31,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (1ST DAY J/T: CRT HRS CLSG ARGUM FRM CNSL ON DFT MOUZIN'S MOT TO DISM. CRT ORD MOUZIN'S MOT TO DISM DND AND FUR ORD RMNG PART OD CASTNAO'S MOT TO DISM DND. CRT ORD GVT'S MOT FOR RECONSID OF IT'S RULG REGARDING EVID DENIED. CRT MKS ITS RULG ON PROV RESERVED ITEMS OF EVID IN THE MMOT OF DFT MR C AND CANTELLI. CRT ORD RMNDR OF MOT DND IN PART AND GRANTED IN PART. JURY IMPANELMENT BGNS. CRT ORD MATTER CONTD TO 3/9/83 @ 9:30 AM FOR RMNDR OF J/PANEL AND 9:00 AM FOR CNSL. MED ORD ISS'D TO USM AND T.I. FOR EXAM OF SAMUEL SCHUSTER. ABST ORD ISS'D TO BOP, USM AND T.I. REGARDING CONF OF DFT CARVAJAL ALLWG ACCESS TO CNSL.

ATTY J. IVERSON NOT PRES. CRT HVG BN INFRMD THAT HE IS ENGAGED IN TRIAL IN TEXAS AND WILL NOT BE APPEARING AT THIS TRAIL ORD THE CASE AS AGAINST DFT O. PASALODOS SEVERED. TRIAL AS TO DFT PASALODOS TO BE HRD AT CONCL OF PRES TRIAL. CRT ORD ALL PREV SEALED DOCUMENTS REGARDING ATTY ANTHONY CAPAOZZOLA NOW UNSEALED.) (JUDGE TASHIMA) (Dkt'd 03/10/83).

453 Jury trial continued to 03/09/83 @ 9:00 AM (AT 9:30 FOR JURY IMPANEL, 9:00 FOR CNSL.) (JUDGE TASHIMA) (Dkt'd 03/10/83).

03/09/83 454 — NBC FLD APP FOR ORD SHORTENING TIME, DECLARATION OF TRACY S RICH. (Dkt'd 03/10/83).

454 Order filed (FLD CRT ORDER. CRT ORD MOT OF NBC TO COPY TAPE ALL VIDEO AND AUDIO TAPES ADM INTO EVID IN THIS ACTION IS SO SHORTENED SO THAT SERVC BY MENAS OF PERSONAL DELIV BY 3/9/83.) (JUDGE TASHIMA) (Dkt'd 03/10/83).

455 Motion filed (MOT#136) (FLD MOT OF APPLICANT NATIONAL BROADCASTING COMPANY, INC. TO COPY ALL VIDEO AND AUDIO TAPES ADMITTED INTO EVIDENCE, MEMO OF P &A IN SUPPORT OF MOTION.) (Dkt'd 03/10/83).

456 — (MOT#136) (DFT MOUZIN FLD MEMO OF P & A IN OPP TO APPLI-

CATION TO COPY ITEMS ADMITTED IN EVIDENCE.) (Dkt'd 03/10/83).

457 Trial held-jury (Counts 1,2-3,4-5,21-22,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (2ND DAY J/T: CRT ORD MOT OF APPLICANT NBC TO COPY ALL VIDEO AND AUDIO TAPES SET FOR HRG ON 3/11/83 @ 1:00 PM. JURY IMAPNELED AND SWN. CRT EXCUSES JURY UNTL 3/11/83 @ 9:00 AM. CRT ORD THE ORDER FRM THE 9TH CIRC USCA DENYING DFT SCHUSTER'S WRIT OF MANDAMUS FLD AND SPREAD UPN THE REC OF THIS CRT. JURY IS IMPANELED AND SWN.) (JUDGE TASHIMA) (Dkt'd 03/11/83).

457 Jury trial continued to 03/11/83 @ 1:00 PM (JUDGE TASHIMA) (Dkt'd 03/11/83).

03/10/83 458 Order filed (IN CHAMBERS MINUTE ORDER. CRT HVG BN INFRMD THAT DFT SCHUSTER REQUIRED ORAL SURGERY THIS DATE AND THAT HE WILL BE UNAVAILABLE FOR CRT ON 3/11/83, JURY TRIAL IS ORD CONTD. CLK SHALL NOTIFY BY PHONE ALL JURORS OF NEW DATE AND TIME. CLK SHALL NOTIFY BY PHONE THE AUSA AND ATTY MEDVENE TO RPT TO CRT W/THEIR CLIENTS AT 9:00 AM ON 3/15/83 TO HR MOT FOR APP NBC TO COPY ALL VIDEO AND AUDIO

TAPES.) (JUDGE TASHIMA) (Dkt'd 03/11/83).

458 Jury trial continued to 03/15/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 03/11/83).

458 Motion hearing set for 03/15/83 @ 9:00 AM (MOT#136) (RE: MOT OF APP NBC TO COPY TAPES ADM INTO EVID.) (JUDGE TASHIMA) (Dkt'd 03/11/83).

460 Filed memorandum in support of motion (MOT#136) (NBC FLD REPLY MEMO OF NATIONAL BROADCASTING COMPANY, INC IN SUPPORT OF ITS MOT TO COPY ALL VIDEO AND AUDIO TAPES ADMITTED INTO EVIDENCE. RTNBL 3/15/83 @ 9:00 AM.) (Dkt'd 03/14/83).

03/11/83 462 Motion in limine filed (MOT#137) (Counts 1,2-3,4-5,21-22,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (FLD GVT'S MOT IN LIMINE RE ALLEGATIONSL OF CORRUPTION AND MISCONDUCT, MEMO OF P & A. RTNBL 3/15/83 @ 9:00 AM.) (Dkt'd 03/14/83).

463 Filed reply to answer to motion (MOT#136) (FLD GVT'S RESP TO THE APP OF NATIONAL BROADCASTING COMPANY, INC FOR ORD PERMITTING COPYING OF AUDIO AND VIDEO TAPES ADMITTED INTO EVIDENCE. RTNBL 3/15/83 @ 9:00 AM.) (Dkt'd 03/14/83).

464 Order filed ((IN CHAMBERS HEARING) EX PARTE HRG HLD IN

CHAMBERS AT REQUEST OF GVT. CRT ORD PROCEEDGS REPORTED AND ORD SEALED. PARTIES PRES INCL JUDGE TASHIMA, C/R, CRD, AUSA PERRY & DROOYAN.) (JUDGE TASHIMA) (Dkt'd 03/14/83).

03/14/83 472 Order filed ((IN CHAMBERS) MINUTE ORDER. EX PARTE CONFR HLD IN CHAMBERS W/ONE DFT PRES. MATTER ORD RPTD AND SEALED.) (JUDGE TASHIMA) (Dkt'd 03/21/83).

535 Filed transcript of proceedings for 03/07/83 (FLD RPTR'S TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).

536 Filed transcript of proceedings for 03/08/83 (FLD RPTR'S TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).

03/16/83 466 Order filed (FLD ABST OF CRT ORDER. CRT ORD DFTS MOUZIN, CARVAJAL AND SAMUEL SCHUSTER ARE TO BE ALLOWED A HOT LUNCH PAID FOR BY THEM OR THEIR CNSL WHILE IN THE USM'S CUSTODY DRG THE COURSE OF THIS TRAIL. ONE OF THE ATTYS FOR THE ABOVE NAMED DFTS OR AN ASSIST OF THE ATTY DESIGNATED IN WRITING IS TO BE ALLOWED TO BRING IN A HOT MEAL TO D'THE DFT IN LOCKUP. THIS ORD IS SUBJ TO ANY IMMED AND OVERRIDING SECURITY REQUIREMENT OF THE SUM.) (JUDGE TASHIMA) (Dkt'd 03/16/83).

467 Trial held-jury (Counts 1,2-3,4-5,21-22,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (4TH DAY J/T: CRT ORD APP OF NBC TO COPY ALL VIDEO AND AUDIO TAPES GRANTED. THOMAS F. MOORE C,S,T. EXH MKD AND ADM. TRIAL ORD CONTD. JURY EXCUSED AND INSTRUCTED TO RTN AT THAT TIME. CRT ORD GVT'S MOT TO EXCL EVID GRANTED IN PART AND RESERVED IN PART. CRT AND CNSL DISCUSS DFT MOUZIN'S ORAL MOT TOS TRIKE THE TESTIMONY OF WITNESS MOORE AND MOT FOR MISTRIAL. CRT DIR DFT MOUZIN'S CNSL TO FILE SAID MOT BY 3/21/83 FOR HRG ON 3/25/83.) (JUDGE TASHIMA) (Dkt'd 03/17/83).

467 Jury trial continued to 03/17/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 03/17/83).

467 Motion hearing held (MOT#136) (JUDGE TASHIMA) (Dkt'd 03/17/83).

467 Motion granted (MOT#136) (CRT ORD APP OF NBC TO COPY ALL VIDEO AND AUDIO TAPES GRANTED.) (JUDGE TASHIMA) (Dkt'd 03/17/83).

470 Order filed (FLD MEMORANDUM OPINION AND ORDER. CRT ORD NBC'S APP TO COPY THE VIDEO AND AUDIO TAPES ADMITTED INTO EVIDENCE IS GRANTED.) (JUDGE TASHIMA) (Dkt'd 03/18/83).

471 Order filed (FLD CRT ORDER PERMIT-

TING NATIONAL BBRODCASTING COMPANY, INC TO COPY ALL VIDEO AND AUDIO TAPES ADMITTED INTO EVIDENCE. (IN ACCORDANCE W/THE MEMO OPINION SIGNED AND FLD CONCURRENTLY HEREWITH.)) (JUDGE TASHIMA) (Dkt'd 03/18/83).

03/17/83 473 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (5TH DAY J/T: T. F. MOORE RESUMES TESTIMONY. W. FRANDSEN, J. REMIER, M. GLASSER & R. JACOBY, JR. C,S,T. EXH MKD AND ADM. TRIAL ORD CONTD. GVT'S MOT TO EXCLUDE EVID PREV ORD RESERVED IN PART IS NOW ORD GRANTED SUBJ TO BEING REOPENED AT A LATTER TIME BY THE DFTS.) (JUDGE TASHIMA) (Dkt'd 03/21/83).

473 Jury trial continued to 03/18/83 @ 8:30 AM (JUDGE TASHIMA) (Dkt'd 03/21/83).

03/18/83 474 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (6TH DAY J/T: R. JACOBY, JR. RESUMES TESTIMONY. EXH MKD & ADM. TRIAL ORD CONTD. PHONE CALL ORD ISS'D FOR DFT MOUZIN.) (JUDGE TASHIMA) (Dkt'd 03/21/83).

474 Jury trial continued to 03/22/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 03/21/83).

03/22/83	477	Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (7TH DAY J/T: RALPH JACOBY, JR RESUME STESTIMONY. EXH MKD & ADM. TRIAL ORD CONTD.) (JUDGE TASHIMA) (Dkt'd 03/24/83).
	477	Jury trial continued to 03/23/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 03/24/83).
	538	Filed transcript of proceedings for 03/17/83 (FLD RPTR'S TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).
	539	Filed transcript of proceedings for 03/17/83 (FLD RPTR'S PARTIAL TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).
	540	Filed transcript of proceedings for 03/18/83 (FLD RPTR'S PARTIAL TRANSCRIPT OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).
03/23/83	478	Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (8TH DAY J/T: R. HACOBY, JR. RESUMES TESTIFYING. EXH MKD FOR IDENTIFIICATION. TRIAL ORD CONTD. ABST ORDER ISS'D TO USM AND T.I. WARDEN INSTRUCTING T.I. TO GV DFT CARVAJAL BREADFAST PRR TO BEG TRANSP TO CRT.) (JUDGE TASHIMA) (Dkt'd 03/24/83).
	478	Jury trial continued to 03/24/83 @ 9:30

AM (JUDGE TASHIMA) (Dkt'd 03/24/83).

03/24/83 482 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (9TH DAY J) (JUDGE TASHIMA) (Dkt'd 03/28/83).

03/25/83 483 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) 10TH DAY J/T: R. AARONSON, R. K. CALDWELL, R. PATERSON & W. C. BISH C,S,T. EXH MKD & ADM. CRT ORD TRIAL CONTD. CRT DIR DFT SCHUSTER TO FILE ANY MOT TO DISQUALIFY PROSECUTOR NLT 3/31/83. GVT IS GRANTED UNTL 4/5/83 TO FILE THEIR OPP.) (JUDGE TASHIMA) (Dkt'd 03/28/83).

483 Jury trial continued to 03/29/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 03/28/83).

03/29/83 485 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (11TH DAY J/T: WM H. JOHNSON & H. B. MORGAN C,S,T. EXH MKD & ADM. TRIAL ORD CONTD.) (JUDGE TASHIMA) (Dkt'd 03/31/83).

485 Jury trial continued to 03/30/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 03/31/83).

03/30/83 486 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-

S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (12TH DAY J/T: HENRY B. MORGAN RESUMES TESTIMONY. DFT CANTELLI, MOUZIN, SCHUSTER, CASTANO & MR. C MV FOR MISTRIAL. DFT CARVAJAL MVS DOR DISMISSAL AS TO CERTAIN CTS CHARGED. DFT SCHUSTER MVS FOR DISMSL AS TO CT 2 AND FOR SEVERANCE. DFT CANTELLI MVS FOR DISMISSAL AS TO CT 2. DFT MOUZIN MVS FOR DISMISSAL AS TO CT 3. CRT ORD MOTS TO DISM CT 2 DENIED. CRT ORD DFT MOUZIN'S MOT FOR MISTRIAL ORD DENIED. CRT ORD MOT FOR MISTRIAL BY DFT CANTELLIM MR C, CASTANO AND SCHUSTER GRANTED AND SD DFTS ARE SEVERED FRM TRIAL NOW PENDG AGAINST DFTS MOUZI AND CARVAJAL. CRT ORD TRIAL OF THESE SVRD DFTS AND DFT 0. PASALODOS, PREV SEVERED, SET FOR HRG ON 5/24/83 @ 9:30 AM. CRT FNDS TIME FRM THIS DATE 3/30/83 to 5/24/83, IS EXCLUDABLE IN THE INTERESTS OF JUSTICE AND PURS TO 18:3161(H)(8)(A). HRG ON DFT MOUZIN'S MOT TO DISM CT 3 AND DFT CARVAJAL'S MOT TO DISM IS CONTD. AT REQ OF CNSLTHE TRIAL IS ORD CONTD TO 4/5/83 @ 9:30 AM AND THE BAILIFF IS INSTRUCTED TO INFORM THE JURORS WHTN THEY ARRIVE ON 3/31/83 THAT THEY ARE EXCUSED

UNTL THAT DATE AND TIME. DFT SCHUSTER MVS FOR BAIL RED. CNSL ARGUE. CRT ORD BAIL RED. CR GR'S GVT'S REQ FOR NEBBIA HRG PRR TO POSTG OF ANY BOND. CRT DIR CNSL TO FILE ANY NEW MOTS AS TO RMNG DFTS NLT 4/18/83 AND SET FOR HRG ON 5/9/83 @ 1:30 PM.) (JUDGE TASHIMA) (Dkt'd 04/01/83).

486 Jury trial continued to 04/05/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/01/83).

486 Status hearing continued to 03/31/83 @ 1:30 PM (RE: DFT MOUZIN'S MOT TO DISM CT 3, DFT CARVAJAL'S MOT TO DISM.) (JUDGE TASHIMA) (Dkt'd 04/01/83).

486 Motion made in open court for severance/separate trial (MOT#139) (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (DFTS CANTELLI, MOUZIN, SCHUSTER, CARVAJAL MV FOR SEVERANCE.) (Dkt'd 04/01/83).

486 Motion for severance/separate trial granted (MO #139) (JUDGE TASHIMA) (Dkt'd 04/01/83).

543 Filed transcript of proceedings for 03/29/83 (FLD RPTR'S PARTIAL TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).

03/31/83 488 Status hearing held (HRG MOT OF DFTS CARVAJAL & MOUZIN. CRT HRS ARGUMENTS FRM CNSL. CRT GR DFT CARVAJAL'S REQ TO PUT HIS

MOT TO DISM IN WRITING. DFT CARVAJAL IS GR TO 4/7/83 TO FILE AND SV HIS MOT TO DISM CTS 3,27 AND GVT IS GR UNTL 4/11/83 TO FILE TIS OPP. MOT SHALL BE HRD AT 9:30, 4/12/83. CRT ORD MOUZIN'S MOT TO DISM CT 3 DENIED. DFT MOUZIN ORALY MVS TO DISM CT 2. MOT ORD DENIED BUT THE CRT ORD THAT "OVERT ACT 16" IS STRIKEN. DFT MOUZIN'S ORAL MOT FOR RECONSIDERATION OF HER MOT FOR MISTRIAL IS ORD DENIED. AFT FUR ARGUMENT, ON MOT OF GVT, CT 2 ORD DISMSD AS TO DFT CARVAJAL & MOUZIN ONLY.) (JUDGE TASHIMA) (Dkt'd 04/04/83).

488 Dismissed on government's motion (Count SS2) (ON MOT OF GVT, CT 2 (B) IS ORD DISMSD AS TO DFTS CARVAJAL & MOUZIN, ONLY.) (JUDGE TASHIMA) (Dkt'd 04/04/83).

544 Filed transcript of proceedings for 03/30/83 (FLD RPTR'S TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).

545 Filed transcript of proceedings for 03/25/83 (FLD RPTR'S PARTIAL TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).

04/05/83 490 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (13TH DAY J/T: DFT MOUZIN ORALLY MVS FOR SEVERANCE AND MISTRIAL,

DENIED. HENRY B. MORGAN RESUMES TESTIMONY. EXH MKD & ADM. TRIAL ORD CONTD.) (JUDGE TASHIMA) (Dkt'd 04/12/83).

490 Jury trial continued to 04/06/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/12/83).

04/06/83 489 — RECV'D LETTER FROM JURY REQUESTING TO BE EXCUSED FROM JURY DUTY (Dkt'd 04/08/83).

491 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (14TH DAY J/T: JUROR #9, KALINOSKI EXCUSED AND REPLACED BY ALTERN JUROR #1, CLEVELAND. HENRY B. MORGAN RESUMES TESTIMONY. EXH MKD & ADM. CRT ORD THAT ALL TRANSC OF THE IN CHAMBERS PROCEEDGS REGARDING D. HACKETT DATED 3/11/83, 3/14/83 AND 3/21/83 ARE UNSEALED. FRED A. GHIO AND LARRY N. LYONS C,C,T FOR THE GVT. TRIAL ORD CONTD.) (JUDGE TASHIMA) (Dkt'd 04/12/83).

491 Jury trial continued to 04/07/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/12/83).

04/07/83 492 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (15TH DAY J/T: DFT WIDDICOMBE MVS TO CONT HER SENTCG DATE, GRANTED. SENTCG DATE FOR DFT WIDDI-

COMBE IS CONTD. LARRY N. LYONS RESUMES TESTIMONY. EXH MKD & ADM. LOIS "RUSTY" WIDDICOMBE, STELPHEN M. SWANSON, SHELLEY ALTENSTADTER AND JOY ADELMAN C,S,T. TRIAL ORD CONTD.) (JUDGE TASHIMA) (Dkt'd 04/12/83).

492 Jury trial continued to 04/12/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/12/83).

04/11/83 495 Filed government's proposed jury instructions (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (FLD GVT'S PROPOSED JURY INSTRUCTIONS.) (Dkt'd 04/14/83).

04/12/83 493 — FLD GVT'S FIFTH IN CAMERA SUBMISSION. (Dkt'd 04/14/83).

496 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (16TH DAY J/T: EXH MKD AND ADM. JOY ADELMAN RESUMES TESTIMONY. LAURIE MINTZ AND DOROTHY HACKETT C,S,T. TRIAL ORD CONTD.) (JUDGE TASHIMA) (Dkt'd 04/14/83).

496 Jury trial continued to 04/13/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/14/83).

04/13/83 497 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-

SS7,SS17,SS25,SS27) (17TH DAY J/T: ARTHUR BALETTI C,S,T. DOROTHY HACKETT RESUMES TESTIMONY. TRIAL ORD CONTD. ATTY TAKIFF APPRS ON BEHALF OF DFT SMAUEL SCHUSTER AND REQUESTS CRT CONT DATES BY WH MOTS MUST BE FLD FOR SEVERED TRIAL SET TO COMM ON 5/24/83. REQ GRANTED. ALL FLG DATES REGARDING MOTS ARE CONTD BY 1 WK AND THE MOT SHALL BE HRD ON 5/16/83 AT 1:30 PM. ATTY TAKIFF TO NOTIFY AL CNSL.) (JUDGE TASHIMA) (Dkt'd 04/14/83).

497 Jury trial continued to 04/14/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/14/83).

04/14/83 500 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (18TH DAY J/T: GARRY NEWBROUGH C,S,T. EXH MKD AND ADM. HENRY B. MORGAN RECALLED & TESTIFIED. DFT CARVAJAL'S MOT FOR MISTRIAL ORD DENIED. DFT MOUZIN'S RENEWED MOT FOR SEVERANCE DENIED. DFT MOUZIN'S RENEWED MOT FOR MISTRIAL ORD DENIED. DFT MOUZIN'S MOT FOR JGMT OF ACQUTL GRANTED AS TO CTS 15,20 ONLY. CTS 15,20 ORD DISM. DENNIS DIXON, WILLIAM BAMMER, RICHARD AARONSON & RICHARD DROOYAN

C,S,T FOR DFT MOUZIN. TRIAL ORD CONTD.) (JUDGE TASHIMA) (Dkt'd 04/15/83).

500 Jury trial continued to 04/15/83 @ 8:30 AM (JUDGE TASHIMA) (Dkt'd 04/15/83).

04/15/83 501 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (19TH DAY J/T: WITNS M. GLASSER, RALHPH JACOBY, TOM MOORE AND BARBARA MOUZIN ARE C,S,T. FUR TR CONTD.) (JUDGE TASHIMA) (Dkt'd 04/18/83).

501 Jury trial continued to 04/19/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/18/83).

04/18/83 502 —GVT FLD GVT'S PROPOSED VERDICT FORM AND ADDITIONAL JURY INSTRUCTIONS. (Dkt'd 04/19/83).

4/19/83 504 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (20TH DAY J/T: B. MOUZIN RESUMES TESTIFYING. EXHIBITS MARKED. FRANK J. SALERNO C,S,T FOR DFT MOUZIN. B. MOUZIN RESUMES TESTIFYING AGAIN. IN CHAMBERS HRG HLD AND WITN SWN. EXH 1002 MKD. TRANSC ORD SELAED AS TO IN CHAMBERS HRG. TRIAL ORD CONT .) (JUDGE TASHIMA) (Dkt'd 04/22/83).

	504	Jury trial continued to 04/20/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/22/83).
04/20/83	505	Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (21ST DAY J/T: B. MOUZIN RESUMES TESTIMONY. EXH MKD AND ADM. TRIAL ORD CONTD FOR DISCUSSION OF JURY INSTRUCTIONS W/ ONLY CNSL PRES. ALL CNSL, JURY AND DFT ORD TO RTN FOR FUR TRIAL. 4/26/83 @ 9:30 AM.) (JUDGE TASHIMA) (Dkt'd 04/22/83).
	505	Status hearing set for 04/25/83 @ 2:00 PM (RE: DISCUSSION OF J/INSTRUCTIONS W/ONLY CNSL PRES.) (JUDGE TASHIMA) (Dkt'd 04/22/83).
	505	Jury trial continued to 04/26/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/22/83).
04/22/83	511	Filed defendant's proposed jury instructions (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (DFT FLD PROPOSED JURY INSTRUCTIONS.) (Dkt'd 04/25/83).
04/25/83	518	Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (22ND DAY J/T: CRT & CNSL DISC JURY INSTRUCTIONS AND VERDICT FRMS. ON MOT BY GVT, CRT ORD SENTS OF

DFT ADELMAN AND GLASSER CONTD TO 5/16/83 @ 1:30 PM. AUSA TO NOTIFY DFT CNSL RE CONT SENTC DATES.) (JUDGE TASHIMA) (Dkt'd 04/26/83).

518 Jury trial continued to 04/26/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 04/26/83).

04/26/83 520 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (23RD DAY J/T: B. MOUZIN RESUMES TESTIMONY. EXH MARKED AND EXH. DFT MOUZIN RESTS. DFT CARVAJAL RESTS. DENNIS DEXON, WM. BAMMER, HENRY B. MORGAN CASSLED ON REBTL BY GVT. JURY EXCUSED AND ORD BACK FOR CLSING ARGUMENTS ON 4/27/83. DFT MOUZIN RENEWED MOT TO SEVER ORD DENIED. DFT MOUZIN AND CCARVAJAL'S RULE 29 MOT DENIED. TRIAL ORD CONTD.) (JUDGE TASHIMA) (Dkt'd 04/27/83).

520 Jury trial continued to 04/27/83 @ 9:00 AM (JUDGE TASHIMA) (Dkt'd 04/27/83).

523 Order filed (ON 23RD DAY J/T, CRT EXC ALTERN JUROR #3, SIGMUND OLKEWICZ.) (JUDGE TASHIMA) (Dkt'd 05/2/83).

04/27/83 524 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (24TH DAY J/T:

GVT STIP W/DFT SCHUSTER TO RED OF BOND. CRT APPVS STIP AND ORD CONDTNS OF REL AS TO DFT SCHUSTER AMENDED IN THAT DOCUMENTATION & JUST OF SUR AS PRESENTED IS SUFFICIENT AND BND AMNT RED TO $707,390. ALL OTHER TRMS AND CONDS RMN THE SAME. CNSL MK CNOSING ARGUMENTS. CRT ORD TRIAL CONTD FOR FUR TRIAL.) (JUDGE TASHIMA) (Dkt'd 05/02/83).

524 Jury trial continued to 04/28/83 @ 9:00 AM (RE: FUR TRIAL) (JUDGE TASHIMA) (Dkt'd 05/02/83).

04/28/83 526 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (25TH DAY J/T: CRT INSTR JURY. ALT JUR 1,2 ORD TO RMN IN CRTHSE DRG DELIB PRD AND RMN ON CALL IN JURY ASSEMBLY ROOM. BAILIFF & MATRON SWN. JURY RETIRES TO DELIB AT 10:10 AM. JURY CONCLDS AT 4:45 PM AND ORD TO RTN AT 8:30 AM FOR JUR DELIB.) (JUDGE TASHIMA) (Dkt'd 05/02/83).

526 Jury trial continued to 04/29/83 @ 8:30 AM (JUDGE TASHIMA) (Dkt'd 05/02/83).

04/29/83 528 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (26TH DAY J/T: JURY BEGNS DELIB AT 8:30 AM AND IS EXCSD AT 3:30 PM. JURY

TO RTN ON 5/2/83 @ 9:30 AM FOR FUR DELIB. FLD JURY NOT #1.) (JUDGE TASHIMA) (Dkt'd 05/02/83).

528 Jury trial continued to 05/02/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 05/02/83).

05/02/83 529 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (27TH DAY J/T: JURY CONT DELIB @ 9:30 AM AND CONCLDS FOR THE DAY AT 4:30 PM. JURY TO RETURN ON 5/3/83 TO CONT DELIB.) (JUDGE TASHIMA) (Dkt'd 05/05/83).

529 Jury trial continued to 05/03/83 @ 9:30 AM (JUDGE TASHIMA) (Dkt'd 05/05/83).

05/03/83 530 Trial held-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS2-SS3,SS5-SS7,SS17,SS25,SS27) (28TH DAY J/T: FLD JURY NOTE #2 AND CRT'S NOTE TO JURY. READ AND FLD VERDICTS OF G AS TO ALL RMNG CTS CHARGED AS TO DFTS MOUZIN AND CARVAJA. DFT MOUZIN - G ON CTS 1,3,4,5,6,8,9,10,11,12,13,14,16,17,18,19,23,26,28 OF SECOND SUPERSEDING INDCT. DFT CARVAJAL - G ON CTS 1,3,5,6,7,17,25,27. CNSL MKS ARGUMENTS RE FORFEITURE ISSUE ON CT 28 AS TO MOUZIN. JURY RETIRES TO DELIB AT 11:50 AM ON SPECIAL VERDICT RE FORFEITURE AND RETURNS W/VERDICT AT 2:00 PM. READ

AND FLD SPEC VERDICT THAT FORFEITURE IS PROB. FLD JURY NOTC #3. DFT MOUZIN REQUESTS EXEENSION OF TIME TO FILE MOTS FOR ACQUITTAL AND NEW TRIAL, JOINED BY DFT CARVAJAL. CRT ORD EXT GRANTED. MOTS FOR ACQUITTAL & NEW TRIAL SHALL BE SVD AND FLD BY 5/17/83. GVT OPPS TO MOS ORD FLD BY 5/27/83. MOTS SHALL BE SET FOR HRG ON 6/6/83 @ 1:30 PM. CRT ORD MATTER REF TO P/O FOR I & R AND CONT FOR SENTC TO 6/6/83 @ 1:30 PM. GVT'S ORAL MOT TOR EMAND DFTS TO CUST ON NO BAIL ORD DENIED, W/O PREJ TO BEING RENEWED.) (JUDGE TASHIMA) (Dkt'd 05/05/83).

530 Motion filed (MOT#152) (DFT MOUZIN REQ EXTENSION OF TIME TO FILE MOTS FOR ACQTL AND NEW TRIAL, JOINED BY DFT CARVAJAL.) (Dkt'd 05/05/83).

530 Motion granted (MOT#152) (CRT ORD EXTENSION GRANTED. MOTS FOR ACQTL & NEW TRIAL SVD & FLD BY 5/17/83. GVT OPP BY 5/27/83. MOTS SET FOR HRG ON 6/6/83 @ 1:30 PM.) (JUDGE TASHIMA) (Dkt'd 05/05/83).

530 Motion made in open court (MOT#153) (GVT MKS ORAL MOT TO REMAND DFTS TO CUSTODY ON NO BAIL.) (Dkt'd 05/05/83).

530 Motion denied (MOT#153) (CRT ORD MOT TO REMAND DFT TO CUST

W/O BAIL DENIED, W/O PREJ TO BEING RENEWED.) (JUDGE TASHIMA) (Dkt'd 05/05/83).

530 Trial ends-jury (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35,SS1,SS3,SS5-SS7,SS17,SS25,SS27) (JUDGE TASHIMA) (Dkt'd 05/05/83).

530 Jury verdict of guilty (Counts SS1,SS3,SS5-SS7,SS17,SS25,SS27) (JUDGE TASHIMA) (Dkt'd 05/05/83).

530 Order cause referred to the probation department for a pre-sentence investigation (Counts SS1,SS3,SS5-SS7,SS25, SS27) (JUDGE TASHIMA) (Dkt'd 05/05/83).

530 Sentencing set for 06/06/83 @ 1:30 PM (Counts SS1,SS3,SS5-SS7,SS17, SS25,SS27) (JUDGE TASHIMA) (Dkt'd 05/05/83).

546 Filed transcript of proceedings for 04/07/83 (FLD RPTR'S PARTIAL TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).

05/05/83 549 Filed transcript of proceedings for 09/13/82 (FLD RPTR'S TRANSC OF PROCEEDGS.) (JUDGE TASHIMA) (Dkt'd 05/06/83).

05/10/83 554 Order filed ((MINUTE ORDER) THE IN CHAMBERS HEARING OF 4/19/83 MAY BE TRANSCRIBED AND THE GVT MAY MK IT AVAILABLE TO ANY DFT IN CR-83-153-ER IN ACCORDANCE WITH THE JENCKS ACT, F.R.CR.P. OR AS ORDERED BY THE JUDGE PRESIDING OVER THE ACTION. THE ORIGINAL

TRANSC WILL BE PLACED UNDER SEAL.) (JUDGE TASHIMA) (Dkt'd 05/11/83).

05/31/83 580 — DFT FLD EX PARTE APP FOR AN ORDER SHORTENING TIME, DECLARATION OF MICHAEL D. ABZUG IN SUPPORT THEREOF. (Dkt'd 06/01/83).

06/02/83 581 Filed sentencing memorandum (FLD GVT'S SENTCG M'RECOMMENDATIONS FOR DFT MOUZIN, CARVAJAL, & WARREN, MEMO OF P & A, DECLARATIONS. RTNBL 6/6/83 @ 1:30 PM.) (Dkt'd 06/02/83).

582 Order filed (FLD CRT ORDER. CRT ORD DFT'S MOT FOR CONT AND FOR SUBST OF CNSL MAY BE FLD 5/31/83 AND HRG ON 6/2/83 @ 2:00 PM. MVG PAPERS TO BE SVD ON ATT PALOCIOS PROMPTLY.) (JUDGE TASHIMA) (Dkt'd 06/03/83).

583 Motion filed (MOT#159) (DFT FLD NOTC OF MOT AND MOT FOR SUBST OF CNSL. RTNBL 6/3/83 @ 2:00 PM.) (Dkt'd 06/03/83).

06/03/83 584 Status hearing held (HRG RE: DFT'S MOT TO SUBST CNSL & CONT SENTCG DATE. CRT HRS ARGUMENTS FRM CNSL. CRT ORD DFT'S MOT TO SUBST ATTY ABZUG IN PL AND STEAD OF VICTOR PALACIOS GRANTED. CRT FUR ORD MOT BY DFT TO CONT SENTCG GRANTED. SENTCG DATE IS ORD CNTD.) (JUDGE TASHIMA) (Dkt'd 06/06/83).

584 Motion granted (MOT#159) (CRT ORD DFT'S MOT TO SUBST ATTY ABZUG IN PL AND STEAD OF V. PALACIOS GRANTED.) JUDGE TASHIMA) (Dkt'd 06/06/83).

584 Attorney ABZUG, MICHAEL added to case (ATTY ABZUG IN PL OF ATTY PALACIOS.) (JUDGE TASHIMA) (Dkt'd 06/06/83).

Attorney GILLINGHAM, HOWARD deleted from case (Dkt'd 06/06/83).

584 Sentencing continued to 07/11/83 @ 3:00 PM (Counts SS1,SS3,SS5-SS7,SS17, SS25,SS27) (JUDGE TASHIMA) (Dkt'd 06/06/83).

06/10/83 592 Order filed ((MINUTE ORDER) CRT ORD THAT GVT'S APP FOR RTN OF PROPERTY IS SET ON CAL FOR 7/11/83 @ 1:30 PM. ANY OPP SHALL BE SVD AND FLD BY 6/24/83 AND ANY REPLY SHALL BE SVD AND FLD BY 7/5/83.) (JUDGE TASHIMA) (Dkt'd 06/13/83).

592 Status hearing set for 07/11/83 @ 1:30 PM (RE: HRG ON GVT'S APP FOR RRTN OF PROP.) (JUDGE TASHIMA) (Dkt'd 06/13/83).

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583 Motion filed (MOT#159) (DFT FLD NOTC OF MOT AND MOT FOR SUBST OF CNSL. RTNBL 6/3/83 @ 2:00 PM.) (Dkt'd 06/03/83).

06/03/83 584 Status hearing held (HRG RE: DFT'S MOT TO SUBST CNSL & CONT SENTCG DATE. CRT HRS ARGUMENTS FRM CNSL. CRT ORD

DFT'S MOT TO SUBST ATTY ABZUG IN PL AND STEAD OF VICTOR PALACIOS GRANTED. CRT FUR ORD MOT BY DFT TO CONT SENTCG GRANTED. SENTCG DATE IS ORD CNTD.) (JUDGE TASHIMA) (Dkt'd 06/06/83).

584 Motion granted (MOT#159) (CRT ORD DFT'S MOT TO SUBST ATTY ABZUG IN PL AND STEAD OF V. PALACIOS GRANTED.) JUDGE TASHIMA) (Dkt'd 06/06/83).

584 Attorney ABZUG, MICHAEL added to case (ATTY ABZUG IN PL OF ATTY PALACIOS.) (JUDGE TASHIMA) (Dkt'd 06/06/83).

Attorney GILLINGHAM, HOWARD deleted from case (Dkt'd 06/06/83).

584 Sentencing continued to 07/11/83 @ 3:00 PM (Counts SS1,SS3,SS5-SS7,SS17,SS25,SS27) (JUDGE TASHIMA) (Dkt'd 06/06/83).

06/10/83 592 Order filed ((MINUTE ORDER) CRT ORD THAT GVT'S APP FOR RTN OF PROPERTY IS SET ON CAL FOR 7/11/83 @ 1:30 PM. ANY OPP SHALL BE SVD AND FLD BY 6/24/83 AND ANY REPLY SHALL BE SVD AND FLD BY 7/5/83.) (JUDGE TASHIMA) (Dkt'd 06/13/83).

592 Status hearing set for 07/11/83 @ 1:30 PM (RE: HRG ON GVT'S APP FOR RRTN OF PROP.) (JUDGE TASHIMA) (Dkt'd 06/13/83).

06/14/83 594 Filed substitution of ABZUG, MICHAEL as attorney for defendant (FLD SUBST

OF ATTY.) (JUDGE TASHIMA) (Dkt'd 06/16/83).

06/23/83 597 Status hearing held ((JUDGE GRAY FOR JUDGE TASHIMA) HRG ON MOT OF AMERICAN BROADCASTING COMPANY TO COPY AUDIO TAPES. BARBARA REEVES AND ROBIN SHAPIRO APPEAR ON BEHALF OF AMERICAN BROADCASTING COMPANY, PAUL CARUSO APPEARS ON BEHALF OF CARL CAPAZOLA. HRG HLD AND CRT ORD THE MOTION DENIED.) (JUDGE GRAY) (Dkt'd 06/27/83).

598 — AMERICAL BROADCASTING COMPANIES, INC. FLD PROOF OF SERVICE. (RE NOTC OF MOT OF APPLICANT A.B.C. TO COPY AUDIO TAPES, MEMO OF P & A IN SUPPORT OF A.B.C.'S MOT TO COPY AUDIO TAPES, EX PARTE APP FOR ORDER SHORTENING TIME, DECLARATION OF BARBARA A. REEVES IN SUPPORT THEREOF, (PROPOSED ORDER), LETTER DATED 6/22/83 FRM B. A. REEVES OF MORRISON &* FOERSTER, AND ATTACHMENTS THERETO.) (Dkt'd 07/06/83).

07/07/83 603 Filed sentencing memorandum (DFT FLD SENTCG MEMORANDUM.) (Dkt'd 07/14/83).

07/11/83 608 Sentencing of defendant (Counts SS1,SSS3,SS5-SS7,SS17,SS25,SS27) '(CT SS1: CC A/G 5 YRS. CT SS3: CRT FNDS CT SS3 LESSOR INCL OFFNS

& DOES NOT IMPS SENTC. CT SS5: CC A/G 15 YRS, FINE $25,000. ORD SENTC IMPRSN CT SS5 RN CONSEC SS1. CT SS6: CC A/G 15 YRS, FINE $25,000. ORD SENTC IMPRISN CT SS6 RN CONCUR W/CT SS5. CT SS7: CC A/G 15 YRS, FINE $25,000. ORD SENTC IMPRSN CT SS7 RN CONC W/SS5,SS6 AND SONSEC SS1. CT SS17: CC A/G 5 YRS. ORD SENTC SS17 RN CONS W/CTS SS1,SS5-SS7. CT SS25: CC A/G 4 YRS. ORD SENTC SS25 RN CONC W/SS17 AND CONS W/SS1,SS5-SS7. CT SS27: CC A/G 20 YRS, FINE $100,000. ORD SENTC IMPRSNT CT SS27 RN CONC W/ SS1,SS5-SS7, SS17, SS25. ORD EA CTS SS5-SS7, SRV LIFETIME SPEC PAROLE TRM TO RN CONC W/EA OTHER. ORD THESE SENTC TO RN CONC W/ANY OTHER FED SENTC NW SRVG. CRT REC CONF IN F.C.I., T.I. OR LOMPOC, IF IT IS SUITBL FOR HIS CLASSF. UNDERLYG INDICT DISM. DFT ADVSD OF RI TO APPEAL FLD AND DISTB JGMT. MD JS-3. (ENTRD 7/15/83)) (JUDGE TASHIMA) (Dkt'd 07/15/83).

608 Issued judgment and commitment to U.S. Marshal (Counts SS1,SS3,SS5-SS7,SS17,SS25,SS27) (JUDGE TASHIMA) (Dkt'd 07/15/83).

608 Dismissed on government's motion (Counts 1,2-3,4-5,21-22,31,33,35,S1,S3,S4-S5,S21-S22,S31,S33,S35) (JUDGE TASHIMA) (Dkt'd 07/15/83).

07/12/83	609	Filed notice of appeal (Counts SS1,SS3,SS5-SS7,SS17,SS25,SS27) (APPL#3) (DFT FLD NOTC OF APPEAL. DFT APPEALS TO USCA 9TH CIRC FRM FINAL JGMT OF CONVICTION ENTRD 7/11/83. FORM MLD 7/18/83.) (Dkt'd 07/18/83).
07/15/83	611	— (APPL#3) (FLD ORD FOR TI SCHED FRM USCA 9TH CIRC. TRANSC ORD FRM C/R: 7/26/83. C/R'S TRANS WILL BE FLD IN D/C BY: 9/9/83. OPENG BRIEF: 10/7/83. APPELLEE'S DEISGN: 10/21/83. APPELLEE'S BRIEF: 11/4/83. REPLY BRIEF: 11/18/83.) (Dkt'd 07/25/83).
07/28/83	618	Filed designation for record on appeal (DFT FLD TRASNC DESIGN AND ORDERING FORM.) (Dkt'd 08/03/83).
08/11/83		— (APPL#3) (FLD ORIG REPTRS TRANSC OF PROC HAD ON 2/14/83(VOL I), 3/8/83(VOL 1-AM), 4/7/83(VOL 15), 4/12/83(VOL 16), 6/6/83(VOL 27), 7/11/83(VOL 27A), 8/31/82(VOL A), 11/23/82(VOL D), 2/9/83, 3/11/83, 3/14/83, 3/21/83(VOL K-A, HACKETT), MASTER INDEX FOR CARVAJAL, MASTER INDEX FOR MOUZIN) (Dkt'd 08/16/83).
10/25/83	659	— NUNC PRO TUNC AS OF 6/8/83 APPLIC FOR RETURN OF PROPERTY FLD BY GOVT (Dkt'd 10/25/83).

01/27/84	680	Filed transcript of proceedings for 11/23/82 (Dkt'd 02/03/84).
02/09/84	684	Filed designation for record on appeal (FLD DFT'S DESIGN OF CLRK'S RECORD ON APPEAL) (Dkt'd 02/10/84).

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Broderick.

Now, have you received a copy of this order of March 15th in the Court of Appeals?

MR. PALACIOS: Yes, Your Honor. I just got it. There is an attorney working on that case. He has been working on that case for my office for months.

THE COURT: But this order disbars you from practicing in the Court of Appeals. I think you have an obligation to tell your client that at this point.

The second thing is this: Under our Local Rule 1(e)(2), you will be automatically disbarred from the Bar of this Court because you are disbarred from the Ninth Circuit. And so if you want to take some action, you are going to have to petition some way or other to modify that order.

MR. PALACIOS: I didn't know that.

THE COURT: All I wanted to do was put on the record that I've discussed this with the Chief Judge of the District Court here, and he believes, like I do, that you should be allowed to complete representation in this case. But I think you are under an obligation to talk to your client about it, to do something about this order if you think it's not proper, the Ninth Circuit order. But you take a look at Local Rule 1(e)(2) that says that in effect that if a member of this Bar is disbarred by any other court in which he is admitted, then he automatically is disbarred from practice in this court. If you don't want to suffer that disability, it's your obligation to do something about it. But I wanted to inform you that you better do something about it if you think you have proper grounds. All right.

MR. PALACIOS: Yes, sir. Thank you.

(End of sidebar discussion.)

THE COURT: All right. Ready for the Jury? Let's get the Jury down.

THE CLERK: Yes, Your Honor.

THE COURT: My recollection was this is still the direct of Agent Jacoby. Is that right?

MR. PERRY: Yes, Your Honor. We have another 15 minutes.

(At this point the Jury entered the courtroom.)

THE COURT: All right, Counsel, be seated, please.

Good morning, Members of the Jury. You will recall when we recessed at the end of the week Mr. Perry was still conducting the direct examination of Agent Jacoby.

Go ahead, Mr. Perry.

MR. PERRY: Thank you, Your Honor.

FILED

MAR 18 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

For Publication

RECEIVED MAR 20 1986

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. BARBARA MOUZIN, Defendant/Appellant.	No. 83-5145 DC No. CR 82-518-AWT

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. ALFONSO CARVAJAL, Defendant/Appellant.	No. 83-5168 D.C. No. CR 82-518-AWT **OPINION**

Appeal from the United States District Court
for the Central District of California

A. Wallace Tashima, District Judge, Presiding
Argued January 10, 1986—Pasadena, California
Submitted March 14, 1986

Before: SNEED, POOLE, and FERGUSON, Circuit Judges

FERGUSON, Circuit Judge:

On May 3, 1983, defendants Barbara Mouzin and Alphonso Carvajal were found guilty on several counts in an indictment that charged them with masterminding and operating a large money-laundering business as an adjunct to an international cocaine trafficking organization. Of the numerous issues raised by the defendants on appeal, we need only discuss the three contentions we find meritorious and one issue on whose merit we cannot agree.

Defendant Mouzin was convicted of nineteen separate offenses including: conspiracy, 18 U.S.C. § 371 (Count One); currency reporting violations, 31 U.S.C. § 1059 (current version at 31 U.S.C. § 5322 (1982)) (Counts Eight through Twelve); the Travel Act, 18 U.S.C. § 1952; conspiracy to violate and substantive violations of the narcotics laws, 21 U.S.C. §§ 841, 843(b), 846; managing a Continuing Criminal Enterprise ("CCE"), 21 U.S.C. § 848 (Count Twenty-Six); and racketeering, 18 U.S.C. § 1962(c). Defendant Alphonso Carvajal was convicted on eight counts of the same indictment alleging that he was a principal, or aided and abetted, in all of the above offenses except the currency reporting and racketeering charges. Defendant Mouzin was sentenced to a total of twenty-five years with a lifetime special parole term. Defendant Carvajal was sentenced to an aggregate of twenty-nine years, also with a lifetime special parole.

Both defendants argue that there was insufficient evidence to convict them and that certain evidence was improperly admitted at trial. Defendant Carvajal also contends that his Sixth Amendment rights were violated by the district court's refusal to notify Carvajal or otherwise to act upon learning of the disbarment of Carvajal's counsel by the Ninth Circuit during the two-month trial. Both defendants contend that

their convictions and sentences for the predicate narcotics offenses as they are alleged in their CCE counts must be vacated as lesser-included offenses of the greater CCE offense.

In Parts I, II, and III of this opinion, we find merit in three claims raised by the defendants regarding the insufficiency of the evidence on certain counts and the admission of certain evidence. We are unable to speak with unanimity on defendant Carvajal's Sixth Amendment claim, and Judge Poole writes Section IV for the court with Judge Ferguson in dissent. In Part V of this opinion, we conclude that the imposition of cumulative sentencing for the CCE and predicate narcotics offenses does not violate double jeopardy under the reasoning of *Garrett v. United States,* 105 S. Ct. 2407 (1985).

FACTUAL BACKGROUND

To understand the defendants' arguments on appeal, we find it necessary to discuss the evidence adduced about the cocaine and money-laundering operation and relate the sequence of some events during the trial.

A. The Money-Laundering and Cocaine Conspiracy

1. Defendant Mouzin's Role

In September 1981 defendant Mouzin approached the president of a small Manhattan Beach bank and inquired whether he would accept large cash deposits (in excess of $10,000) without filing the required currency transaction reports (CTRs). At that time defendant Mouzin was employed as a clothing buyer in a Miami-based garment company known as "Mr. C." According to defendant Mouzin, her employment at Mr. C.'s required her to open accounts for South American clients in order to exchange pesos; her clients allegedly did not want to file CTRs because having accounts in the United States was prohibited by their government. The president of the Manhattan Beach bank, Tom Moore, contacted the IRS and agreed to cooperate in an investigation of Mouzin. Moore then agreed with Mouzin to accept her cash deposits without filing the CTRs in return for a fee.

On November 19, 1981, Barbara Mouzin opened a new account, called the A.E.J. Export account, at the Manhattan Beach bank and deposited $20,000 in the account. The evidence indicates that this money formed the proceeds of a cocaine transaction. By January 1982, defendant Mouzin expressed concern to Mr. Moore that the large number of transactions, totaling more than $5 million, might attract attention in such a small bank. Mr. Moore agreed to facilitate finding a larger bank that would cooperate with the defendant. Mr. Moore then introduced Mouzin to an undercover agent, Ralph Jacoby, who claimed that he had connections with a larger bank through which he laundered money. Jacoby, using "Pan Pacific Financial Management" as an undercover front, agreed to accept cash from Mouzin for deposit in Security Pacific National Bank. He represented that his connections would ensure that CTRs were not filed.

Defendant Mouzin gave agent Jacoby millions of dollars beginning in February 1982 and ending in June of that year. Pursuant to Mouzin's instructions, sums were disbursed from that account by wire to other banks in Miami and Panama. On many occasions, codefendant Dorothy Hackett, an employee of Mr. C. and an associate of Barbara Mouzin, delivered cash to the Pan Pacific offices. In March 1982, agent Jacoby introduced Mouzin to two DEA undercover agents. These DEA agents, Morgan and Swanson, desired to purchase large quantities of cocaine. According to Mouzin, she first refused to facilitate such transactions but later consented under economic pressure from agent Jacoby to make up for a short fall from a robbery in the basement of the Pan Pacific Building. At trial, codefendant Hackett, who had previously pled guilty and was awaiting sentence, testified that she picked up the cash for deposit in this account from various sources, including directly from codefendant Carvajal.

On May 27, 1982, defendant Mouzin introduced agents Morgan and Swanson to Alphonso Carvajal at her residence to discuss a large cocaine sale. Carvajal gave Morgan a small

sample of cocaine. The agents wanted a larger sample and, as Carvajal was leaving in his car, Swanson requested one kilogram of cocaine. Carvajal told Swanson that he had left something in the house for them. Upon returning to Mouzin's house, the agents purchased approximately two kilograms of cocaine from Mouzin as a sample.

Defendant Mouzin contended at trial that she operated a money-laundering operation which incidentally had a few customers that may have been dealing in cocaine. She claims that her only connection with cocaine transactions, however, was the May 27 introduction of codefendant Carvajal to the agents. She admitted that she knew others, including codefendants Dorothy Hackett and Lois Widdicombe, who were working for a cocaine dealer not named as a defendant in this case.

2. Defendant Carvajal's Role

Defendant Alphonso Carvajal was charged primarily with narcotics violations. In addition to the evidence of the May 27 meeting with Agents Morgan and Swanson at the Mouzin residence, the agents testified that they met Carvajal in Miami in June 1982 to purchase cocaine. To pay Carvajal for the May cocaine samples, the agents deposited $57,000 in the Pan Pacific front. At the June meeting, the agents purchased 20 kilograms of cocaine from Carvajal. Carvajal had the cocaine delivered in the trunk of a rental car to the agents who, in return, agreed to deposit $1,000,000 in a Miami account. Upon returning to Los Angeles, the agents displayed fictitious wire transfer records to demonstrate payment to Carvajal. Carvajal then stated that he was part of a large cocaine organization.

B. The Trial

These two defendants were indicted along with twenty other defendants on June 24, 1984. After some pretrial motions, the defendants went to trial on a second superseding indictment alleging twenty-eight separate offenses. At least four codefendants who had previously pled guilty appeared

to testify against the defendants. The government introduced as exhibits wiretaps of conversations between the two defendants.

The government also introduced into evidence, over a defense objection, a ledger seized at a codefendant's residence in San Francisco. This ledger, which did not explicitly mention cocaine, was, according to the government, an account book for a large cocaine organization. The ledger was introduced into evidence through the testimony of DEA Agent Lyons, who claimed that he determined that the ledger described, albeit without an explicit reference to cocaine, a massive cocaine operation. Agent Lyons admitted that he had no knowledge of the identity of the ledger's author. The ledger was found at codefendant Costano's residence and did bear his fingerprints. Defense counsel objected to the admission of the ledger and Agent Lyons' testimony on the gound of an inadequate foundation. The government's own handwriting expert could not identify the ledger's author and, beyond the fingerprint, no evidence linked the ledger to codefendant Costano or anyone else. Defendant Carvajal challenges the admission of the ledger as violative of his Sixth Amendment right to confrontation.

The government also introduced a computer printout into evidence, without defense objection. This printout came from a computer disk found during the search of a residence on Trigo Lane in Carlsbad, California. The search, executed on June 29, 1982, netted one pound of cocaine, an Apple personal computer along with a disk marked "Al," a suitcase with a luggage tag for Alphonso Carvajal, and a personal telephone directory listing Carvajal and other alleged cocaine traffickers. IRS Agent Newbrough, who executed the search and made the Apple printout, testified that he saw the name Alphonso when he inserted the disk into the computer although the printout did not display the word Alphonso. Agent Newbrough testified that based on his expert opinion the printout was a numerical running inventory of a cocaine business. Defendant Carvajal challenges the admission of the

printout and the interpretive testimony as both hearsay and Confrontation Clause violations.

During the course of the trial, the district court notified defense counsel for defendant Carvajal that the Ninth Court had disbarred him. The district court judge informed defense counsel Palacios:

> All I wanted to do was to put on the record that I've discussed this with the Chief Judge of the District Court here, and he believes, like I do, that you should be allowed to complete representation in this case. But I think you are under an obligation to talk to your client about it, to do something about this order, if you think it's not proper, the Ninth Circuit Order. But if you take a look at Local Rule 1(e)(2) which in effect says if a member of this bar is disbarred by any other Court in which he is admitted, then he automatically is disbarred from practicing in this Court. If you don't want to suffer that disability, it's your obligation to do something about it. But I wanted to inform you that you'd better do something about it if you have proper ground.

Mr. Palacios had been permanently disbarred in an unrelated case for "failing to meet deadlines, prosecute an appeal, and tendering a bad check to a Court Reporter." *United States v. Cortes-Carvajal,* No. 82-1700 (9th Cir. Mar. 15, 1983). Mr. Palacios continued to represent defendant Carvajal through the balance of the district court proceedings. The record is unclear whether defendant Carvajal was informed of his counsel's disbarment; however, at oral argument the government conceded that Carvajal was not informed of the disbarment. As the above discussion reveals, the district court did not personally inform the defendant of this occurrence.

I.

The Currency and Foreign Transactions Reporting Act ("CFTRA" or "Act"), 31 U.S.C. § 1501 (1976) (current version

at 31 U.S.C. § 5311), was enacted as a subchapter of the Bank Secrecy Act of 1970. The Act imposes a record-keeping and reporting obligation on designated businesses for currency transactions in excess of dollar amounts prescribed by the Secretary of the Treasury. The willful failure to file the required reports with the Treasury Department for transactions in excess of $10,000 is a criminal offense under the Act. *See* 31 U.S.C. §§ 1058-1059 (1976) (current version at 31 U.S.C. § 5322 (1982)); 31 C.F.R. § 103.33(b). By statutory design, however, the reporting obligation for domestic transactions applies only to statutorily defined "financial institutions," 31 U.S.C. § 1052(e) (1976) (current version at 32 U.S.C. § 5312(a)(2)(1982)). The Secretary has also promulgated regulations further defining the term "financial institutions." *See* 31 C.F.R. § 103.11. Counts Eight through Eleven of the indictment charge defendant Mouzin with felony violations of section 1059 for failing to file Currency Transaction Reports ("CTRs") on the receipt of monies during her money-laundering operation. Count Twelve charges her with a felony violation of section 1059 for failure to report a cash delivery to the two undercover agents.

Defendant Mouzin contends that she is not a "financial institution" within the meaning of either the CFTRA, 31 U.S.C. § 1052(e) (1976) (current version at 31 U.S.C. § 5312(a)(2) (1982)) or its implementing regulations, *see* 31 C.F.R. § 103.11. If the defendant is not a "financial institution," she has no reporting obligation for domestic transactions. Mouzin also contends that even if she falls within the regulation's definition of "financial institution," this regulatory definition impermissibly exceeds the bounds of the Act's definition of financial institution. *Cf.* 5 U.S.C. § 706(2)(C). Assuming that she is appropriately considered a "financial institution," Mouzin further argues that she qualifies as a "nonbank financial institution" under the regulations. The regulations exempt from the reporting requirements all transactions between nonbank financial

institutions and commercial banks.[1] 31 C.F.R. § 103.22(b)(1)(iii). The defendant also challenges the sufficiency of the evidence on her five felony currency counts. Finally, the defendant takes exception to the imposition of five felony convictions, rather than one.

In response, the government argues that defendant Mouzin qualifies as a "financial institution" under the Act and the regulations promulgated thereunder. The government admits that the defendant, as an individual, constitutes a "nonbank financial institution" under the regulations. The government denies that the defendant is thereby exempt from reporting the charged transactions, however, because these transactions did not involve a commercial bank, as required by the regulations. *See* 31 C.F.R. § 103.33(b)(1)(iii). The government also rejects the defendant's arguments regarding the number of counts the defendant should be charged with under 31 U.S.C. § 1059. *See United States v. Kattan-Kassin,* 696 F.2d 893, 895-96 (11th Cir. 1983) (construing § 1059); *see also United States v. So,* 755 F.2d 1350, 1354-55 (9th Cir. 1985) (construing § 5322). Finally, the government asserts that the evidence was sufficient on all five of the defendant's currency reporting convictions.

Defendant Mouzin contends that she is not a "financial institution" within the meaning of the CFTRA. The Act defines the term to include various types of legitimate banking and business entities. *See* 31 U.S.C. § 1052(e) (1976) (current version at 31 U.S.C. § 5312(a)(2) (1982)). The Secretary is also empowered to promulgate regulations defining a "financial institution" as any "type of business or institution performing similar, related, or substitute functions" to those listed in the Act. 31 U.S.C. § 1052(e)(21) (current version at 31 U.S.C. § 5312(a)(2)(U) (1982) ("another business or agency" performing similar duties)). By regulation, the Secretary has defined the term "financial institution" to

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[1]According to the government, nonbank financial institutions are exempt from reporting these transactions because the commercial bank will assume the reporting obligation.

include a "person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks" and a "person engaged in the business of transmitting funds abroad." 31 C.F.R. § 103.11. Mouzin argues that the Act limits the reporting obligation to financial institutions which are legitimate financial entities.

The defendant is correct in asserting that the Act only lists legitimate commercial enterprises in its definition of "financial institutions." In enacting the statutory definition of "financial institution," the Ninety-First Congress clearly directed the reporting obligation to legitimate commercial institutions. *See* H.R. Rep. No. 91-975, 91st Cong. 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 4394, 4404-05 (CFTRA intended to thwart diversion of cash to foreign secrecy jurisdictions; facilitate supervision of financial institutions subject to federal supervision; aid law enforcement; and, provide statistics for monetary and economic policy. Secretary authorized "to require any class of domestic financial institutions to maintain appropriate procedures . . . [because] where a financial institution fails to properly train or supervise its employees, recurrent violations can be expected."). The Act lists various legitimate commercial enterprises as financial institutions, for example, currency exchanges, travel agencies, pawnbrokers, and insurance companies. The Act also makes clear that a single individual conducting these activities may indeed constitute a financial institution. *See* 31 U.S.C. § 1052(e) (1976) (current version at 31 U.S.C. § 5312(a)(2) (1982)).[2]

The Treasury regulation that expands upon the statutory definition for "financial institutions" retains the requirement that the "financial institution" be engaged in an ongoing "business." 31 C.F.R. § 103.11. This is consistent with the intent of Congress to facilitate the supervision of domestic

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[2]*See* 31 U.S.C.A. § 5312 explanatory notes (explaining that 1982 revision struck "person who does business" as surplus).

businesses engaged in substantial transactions in currency or monetary instruments. Significantly, Congress did not intend to delegate to the Treasury Department unfettered discretion to define those institutions upon which the reporting obligations will fall. *See* 116 Cong. Rec. 16960 (statement of Rep. Reuss) (describing limited delegation to Secretary). A broad regulatory interpretation of what constitutes a "financial institution" may sweep innocuous currency transfers between private citizens into the realm of the currency laws. Such a result was not the intent of the Ninety-First Congress. Nonetheless, by retaining the legitimate business characteristic for the statutory term "financial institution," the regulations do not extend the statutory definition beyond the expressed intent of Congress. *Cf.* 5 U.S.C. § 706(2)(C).

It is apparent that the conduct of defendant Mouzin qualified her as a "financial institution" under the Act. Defendant Mouzin has admitted that she was, at a minimum, engaged in transferring currency between Colombia and the United States as well as among the states in an ostensibly legitimate business venture. She certainly was aware of the reporting requirements. Hence, on the facts of this case, the defendant was a financial institution under the Act and the implementing regulations.

We also reject defendant Mouzin's further contention that she was exempt from reporting her transactions as a "nonbank financial institution." Although the government agrees that the defendant is a "nonbank financial institution," it denies that her transactions fall within the regulatory exemption for nonbank "transactions with commercial banks." 31 C.F.R. § 103.22(b)(1)(iii). No commercial bank was involved with the defendant's receipt of currency as alleged in Counts Eight through Eleven. Similarly, Count Twelve, which charges the defendant with depositing $500,000 with the two undercover agents posing as Pan Pacific Financial Management, does not directly involve a transfer between the defendant and a commercial bank. We find no evidence to support the

defendant's further contention that these officers were acting as agents of a commercial bank. Thus, defendant Mouzin did not fall within the regulatory exemption for nonbank financial institutions.

Defendant Mouzin's final argument as to her currency reporting convictions questions the sufficiency of the evidence on each count. We view the evidence in the light most favorable to the government to determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Marabelles*, 724 F.2d 1374, 1377 (9th Cir. 1984). The evidence was sufficient as to Count Twelve, which alleged that the defendant engaged in a reportable currency transaction in the form of a delivery of monies to the undercover agents. One of the agents testified to the delivery of the alleged sum by the defendant. Conversely, we find the evidence on the four remaining currency counts, those alleging the defendant's failure to report the receipt of currency, was insufficient.

Counts Eight through Eleven charged the defendant with the receipt of a reportable currency transaction. The regulations define a currency transaction as a "transaction involving the physical transfer of currency from one person to another." 31 C.F.R. § 103.11. The regulations further clarify that a financial institution has fifteen days from the day of the currency transaction to file a report. *Id.* § 103.25(a). The physical transfer of the currency, therefore, is the operative event giving rise to the reporting obligation. To prove a willful failure to report, therefore, the government must produce evidence of a physical "transaction in currency." *Id.* § 103.11. In other words, where the government charges a reporting violation by a financial institution for the receipt or delivery of "currency," as that term is defined, *Id.* § 103.11, the government must present evidence of the physical transfer of the currency. *See id.* § 103.22(a) (describing reportable incident). The physical transfer is the act triggering the fifteen-day period in which to file a report.

We have reviewed the evidence presented by the government on the four "receipt" counts of the indictment (Counts Eight through Eleven) and find the evidence insufficient to sustain the defendant's convictions. At trial, the government presented two sets of evidence to substantiate these charges: as to Counts Eight and Nine, the testimony of the undercover agents as to codefendant Hackett's delivery of monies and, regarding Counts Ten and Eleven, notations in the Costano ledger. The testimony of the agents regarding delivery of sums by codefendant Hackett, however, do not establish the time or terms of a prior reportable receipt of currency by defendant Mouzin. The government produced no evidence of a prior physical transfer of currency sufficient to require Mouzin, as a financial institution, to file a CTR. As to Count Ten and Count Eleven, however, the government presented an improperly admitted ledger as proof that codefendant Hackett picked up sums of money for eventual deposit on two occasions. We need not examine whether this evidence, standing alone, would be sufficient to demonstrate a prior physical transfer. As discussed in Section II, the admission of this ledger without a proper foundation as the statement of a co-conspirator was error.

II.

The defendants contend that the district court erred in admitting two exhibits along with the accompanying interpretive testimony of government agents. The first exhibit, a ledger obtained from a codefendant's residence allegedly detailing a cocaine busines, was admitted over a defense objection to the foundation laid by the government. The second exhibit, admitted without defense objection, was a computer printout from a personal computer found during the search of a home. Although the admission of both exhibits presents similar evidentiary issues, we will discuss each separately.

A. The Ledger

During the trial, the government placed in evidence a ledger found at the San Francisco residence of co-conspirator Costano. This ledger, written in Spanish, did not contain any explicit references to cocaine. The ledger did not mention the name of anyone that the government was able to identify at trial. The authorship of the ledger entries was never established at trial. The government's handwriting expert could not positively link the entries in the ledger to handwriting obtained from co-conspirator Costano.

The government intoduced the ledger through the testimony of DEA Agent Lyons. Agent Lyons testified that, in his expert opinion, the ledger was a record of a large international cocaine operation. Lyons admitted, however, that he did not have any personal knowledge regarding the transactions allegedly chronicled in the ledger, nor could he identify any of the individuals named in the ledger entries. The government asserted that the ledger was admissible under the co-conspirator exception to the hearsay rule because it was found at the Costano residence and contained Costano's fingerprints.

The government urged that the ledger was relevant to Count One, the conspiracy count, and suggested that some entries could be corroborated by the testimony of other conspirators about the dates of various of the cash transactions. Defense counsel objected as to foundation and noted that many of the fingerprints, including those of defense counsel, were also found on the ledger. The defendants did not admit authorship of the ledger entries.

In *United States v. Ordonez,* 737 F.2d 793 (9th Cir. 1984), on identical facts, we reversed a defendant's cocaine conspiracy conviction because of the improper and prejudicial admission of a similarly unascribed ledger. In *Ordonez,* DEA Agent Lyons offered similar interpretive testimony about the content of a ledger entered into evidence without defense objection to the sufficiency of the foundational facts to satisfy

the Confrontation Clause. Even though the defendant had not entered this objection to the admission of the ledger, the *Ordonez* opinion held that its admission without proper foundation was both plain and prejudicial error, violating the defendant's confrontation rights under the Sixth Amendment. *Id.* at 805-07. The primary reason for our confrontation decision rested on the absence of any foundational proof by the government as to the authorship of the ledger entries. *Id.* at 800-05.

In reaching its conclusion, the *Ordonez* opinion rejected the government's argument that possession of a document is tantamount to an adoption of its contents under Rule 801(d)(2)(B) of the Federal Rules of Evidence. *Id.* at 800-01. As appellate judges we are acutely aware of the difference between the mere possession of a document and an adoption of its contents. The *Ordonez* opinion declined to consider the government's argument, raised initially on appeal, that the ledger was not hearsay under Federal Rules of Evidence (801(d)(2)(E). Nevertheless, the *Ordonez* opinion concluded that the admission of the unascribed ledger violated the defendant's confrontation rights. In an attempt to distinguish this case from the facts of *Ordonez,* the government contends that the ledger is admissible under Rule 801(d)(2)(E). Having reviewed the government's efforts to lay a foundation for the admission of the ledger during the trial, we agree with the defendant that its admission was error.

In order to be admissible under Rule 801(d)(2)(E), a statement[3] by a co-conspirator must be made in the course of and in furtherance of a conspiracy. *Ordonez,* 737 F.2d at 801; Fed. R. Evid. 801(d)(2)(E) advisory committee note. Accordingly, there are three separate inquiries a court must undertake before admitting the alleged statement of a co-conspirator into evidence under Rule 801(d)(2)(E). First, the court must find "independent proof of the existence of the

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[3]Fed. R. Evid. 801 defines statements as including both written and oral assertions.

conspiracy." *United States v. Snow,* 521, F.2d 730, 733 (9th Cir. 1975), *cert. denied,* 423 U.S. 1090 (1976). Second, the court must find that the proposed statement was made "in furtherance" of the objectives of the conspiracy. *United States v. O'Connor,* 737 F.2d 814, 820 (9th Cir. 1984), *cert. denied,* 105 S. Ct. 1198 (1985); *United States v. Traylor,* 656 F.2d 1326, 1332-33 (9th Cir. 1981) (idle conversation insufficient). Finally, the court must find as a preliminary matter that the proferred statement was made during the course of the conspiracy. *Ordonez,* 737 F.2d at 801. A necessary corollary to the above three preconditions for admission is that there must also be independent proof "of the connection of the declarant and the defendant to" the conspiracy. *Snow,* 521 F.2d at 733. Again, this is merely a restatement of the requirement that before a statement is that of a "co-conspirator" there must be independent proof of the defendant's and the declarant's status as members of the same ongoing conspiracy. In order to corroborate or refute this status, the litigants must know the identity of the declarant.

Against these minimum criteria for a proper foundation under Rule 801(d)(2)(E) we place the government's proffered foundation for the ledger. Authorship of the ledger entries was never established and therefore we have no knowledge of the declarant's identity. The only evidence even remotely connecting any co-conspirator to the ledger was the fingerprints of co-conspirator Costano. Other fingerprints, including those of defense counsel, were found on the ledger. The government stipulated that its handwriting expert, after examining handwriting exemplars, was unable to identify Costano as the author of the ledger entries. The ledger's only other link to co-conspirator Costano was the presence of the ledger in Costano's residence. This circuit has previously held that mere possession does not constitute an adoptive admission. *Ordonez,* 737 F.2d at 800-01. Consequently, the document's presence at Costano's residence, even assuming that the government could thereby establish possession, does not constitute an adoption of its contents by Costano.

The government's failure to identify the author or authors of the ledger entries rendered the ledger inadmissible under Rule 801(d)(2)(E) for a lack of proper foundation. Knowledge of the identity of the declarant is essential to a determination that the declarant is a conspirator whose statements are integral to the activities of the alleged conspiracy. Of course, identification of the declarant will not, by itself, establish a proper foundation unless the identified declarant is a co-conspirator whose assertions were made in furtherance of and in the course of the conspiracy. Finally, we reject the government's suggestion of equating the foundational requirements for Rule 801(d)(2)(E) with the standards for authentication under Federal Rules of Evidence 901. *See* Fed. R. Evid. 901(b) advisory committee note ("It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.") Rule 801(d)(2)(E) posits a separate foundational threshold that must be satisfied before a declarant's hearsay statement becomes admissible.

B. The Computer Printout

The computer printout admitted into evidence at trial did not have any distinguishing features other than the name "Al" on the disk and the testimony of Agent Newbrough that the name "Alphonso" was displayed on the screen prior to the printout. In reviewing the government's foundation for the admission of this evidence under Federal Rules of Evidence 801(d)(2(E), we cannot but note the similarities between the foundational deficiencies for the ledger and for the computer printout. Nonetheless, there are significant differences between the two mediums, a ledger and a computer disc, that may warrant different treatment. The government did not, and presumably could not, offer any handwriting or other expert testimony to establish the identity of the printout's author based soley on an examination of the printout. There may exist other means by which the author or authors of the printed material could be identified. We

need not, and, on this record, cannot, examine the minimal foundational requirements for the admission of nonbusiness computer-generated statements under Rule 801(d)(2)(E). The government's foundation to the printout was never challenged by the defendants and our review is confined to plain error. Even on this sparse record, however, we must follow our opinion in *Ordonez,* 737 F.2d at 799, and find plain error based on the government's failure to comply with the Confrontation Clause. The only remaining inquiry is whether the error is harmless. Fed. R. Crim. P. 52(a); *see also Chapman v. California,* 386 U.S. 18 (1967).

Although the government contends that the ledger and printout were admitted only to corroborate the general conspiracy, 18 U.S.C. § 371, charges in Count One, the government itself has referred to the ledger in support of the sufficiency of the evidence on the currency report violations in Counts Ten and Eleven. We agree with the government that the admissible evidence on Count One was so overwhelming that the admission of the ledger and printout must be considered harmless as to that conviction. Nonetheless, given the dearth of evidence on Counts Ten and Eleven, we find the improper admission of the ledger and printout to be prejudicial error. Fed. R. Crim. P. 52(a) (harmless error standard applicable to ledger); *Chapman,* 386 U.S. at 24 (harmless error standard applicable to constitutional error re printout). Accordingly, we reverse the defendant's convictions on these two counts based on the improper admission of the ledger and computer printout.

III.

Both defendants raise several challenges to their convictions under the Travel Act, 18 U.S.C. § 1952. *See generally Project, White Collar Crime: Third Annual Survey of Law,* 22 Am. Crim. L. Rev. 279, 353, 354-65 (1984) (describing Travel Act elements). We find merit in only one contention, raised by defendant Mouzin, and accordingly reverse her conviction on Count Thirteen for insufficient evidence. Count Thirteen alleged that the defendant traveled from Miami to Los Angeles

to distribute the proceeds of and otherwise to manage a cocaine organization. The evidence produced at trial reveals that the defendant arrived with codefendant Cantelli at the Manhattan Beach bank "carrying garment bags and suitcases" when they deposited $530,000 in the bank. Codefendant Cantelli mentioned to bank officer Moore that he was the defendant's partner in Miami and he had been talked into "coming down" to Los Angeles. We agree that no reasonable juror could infer the requisite element of interstate travel based soley on the presence of garment bags.

IV.

Written by Judge Poole with Judge Ferguson dissenting.

IV.

Carvajal claims that he was denied effective assistance of counsel because, while the trial was going on, his counsel, Palacios, was disbarred from practicing before this court of appeals for conduct not related to this case, and because that fact was not disclosed to him until the trial was over. He argues for a per se rule that if a lawyer is disbarred during a trial the client must be told; that otherwise the trial cannot proceed, and any further attempted professional services by the lawyer must be deemed legally ineffective under the Sixth Amendment to the United States Constitution. Carvajal also complains that since it was the trial judge who learned of the disbarment and conveyed that information to the lawyer, the judge should personally have told him, the client, of that event and should have halted the trial unless the client knowingly waived his right to "effective representation" of counsel. Alternatively, Carvajal argues that in failing to tell him about Palacios' problem, the judge fostered a conflict of interest between the lawyer and client because he put the lawyer to the embarrassing burden of disclosing to his client that he had been adjudged to have committed unprofessional conduct.

Palacios continued to act as Carvajal's lawyer to the end of trial, and the record is not clear exactly when Carvajal

learned of the order of disbarment. For discussion purposes, we will assume that Carvajal did not get the information until the trial had concluded.

A. Whether Counsel Was Automatically Disqualified from Further Participation.

As we have said above, by the order of the Ninth Circuit, Palacios was disbarred from practicing before this court because of his conduct in unrelated cases "unbecoming a member of the bar of the court" and "failure to comply with * * * rules * * * of the court." Fed. R. App. P. 46(b) and (c). The conduct involved failure to meet deadlines in pending appeals, failure to prosecute an appeal, and giving an insufficient check in payment for court reporter services. The effect such an adjudication in this court will have upon a lawyer's status in a district court will depend upon the rules of the latter court. We therefore must turn to the practice and rules of the district court in which the trial was pending.

Local Rule 2.6.2 of the United States District Court for the Central District of California provides:

> Upon receipt of reliable information that a member of the bar of this court has been suspended or disbarred from practice by the order of any court or administrative agency, this court shall immediately impose a like order of suspension or disbarment. The attorney so suspended may make application to the Chief Judge for reinstatement by regularly noticed motion.

Central District Local Rule 2.6.4 further establishes a procedure for referral of charges which have not yet been adjudicated by a court or administrative agency to a three-judge panel. That panel will conduct a hearing upon notice and the lawyer will have an opportunity to appear and be heard. This rule contemplates a different situation and does not on its face resolve the problem here.

In this case, the trial judge, after receiving notice of the order disbarring Palacios from practicing before the Ninth Circuit, conferred with the Chief Judge of the district court. Their consensus was that the trial ought not be halted. The district judge then discussed the disbarment order with Palacios and urged him to take it up with his client. The record discloses no indication of an intent by either judge or counsel to suspend the trial; nor does it show that the matter was ever revealed to counsel for the co-defendant.

Read literally, Rule 2.6.2 would seem to call for the immediate entry of a "like order" disbarring Palacios from practicing in the Central District. Yet neither the trial judge nor the Chief Judge accorded such significance to the rule, apparently not viewing its requirement as immediate. The announcement of a disbarment order may come at many different stages of a trial court proceeding and may produce consequences of major or only minor nature. The rule has a salutary purpose but obviously an automatic and immediate implementation could in many situations bring about litigation disaster. How, when, and under what circumstances such implementation should be accomplished would seem best left to the sound discretion of the court which promulgated it and the judges who must enforce it. We are therefore constrained to defer to the district court's reading to the extent that such a construction does not involve conflict with an order of this court, the Federal Rules of Civil Procedure, case or statutory law, or the Constitution of the United States. We see no such conflict. On the contrary, the record shows an ongoing jury trial of two defendants who were charged with multiple and very serious criminal offenses which was in its closing stages; that the effect of receipt of the appellate court's order confronted the court with a crucial decision whether to plunge the trial into chaos by the abrupt and sudden disqualification of the counsel for one of the defendants. Resolution of that problem required weighing conflicting rights of fair trial, speedy trial, depriving a party of counsel of his own selection, and thorny questions

of double jeopardy. *See, e.g., Arizona v. Washington,* 434 U.S. 497, 505 (1978) (sua sponte declaration of mistrial without a showing of "manifest necessity" therefor may trigger bar of double jeopardy). Faced with these alternatives, the trial court concluded that exigent circumstances justified postponing the immediate entry of a local disbarment order. This was not the usual situation in which the local rule could be applied easily and without serious disruption of the judicial process. The court had realistically a choice only between the Scylla of going ahead with trial, or the Charybdis of throwing the case into confusion and disarray. We find its decision reasonable and valid.

Some parallel to the trial court's dilemma can be found in many cases where, during trial, an attorney, by design, excess of zeal, or other reason, engages in serious contumacious or provocative conduct. A trial judge contemplates sanctions; but, weighing the length of trial already expended, the difficulty of marshaling witnesses and evidence for a second trial, the interest of a defendant in a trial in which his rights are accorded, and the public's interest in fair, but also prompt and just, resolution of the issue, the judge will often elect to stay his sanction and let the trial come to orderly conclusion, rather than risk or declare a mistrial. *See, e.g., United States v. Altamirano,* 633 F.2d 147 (9th Cir. 1980), *cert. denied,* 454 U.S. 839 (1981).

We conclude that the district court was not required by its Local Rule 2.6.2 immediately and automatically to enter an order disbarring counsel and disqualifying him from further participation in the trial.

This is not to say that Palacios ought not to have shared the information with his client, who then could have been heard as to his views. But we do conclude that neither the ends of justice nor Local Rule 2.6.2 of the Central District of California required the court immediately and automatically to enter an order disbarring Palacios and disqualifying him from further participation, even though Palacios

disregarded the judge's direction that Carvajal be told the unanticipated turn of events.

B. Whether Disbarment Rendered Counsel's Services Ineffective.

Even if we had concluded that under its local rules the district court in this case should have entered a "like order" pursuant to Local Rule 2.6.2, we would reject the argument that disbarment by the circuit court turned Palacios' continued services in Carvajal's behalf ineffective under the Sixth Amendment.

Disbarment is a punishment or penalty imposed upon a lawyer, who is accordingly entitled to procedural due process for himself before imposition of sanction, *In re Ruffalo,* 390 U.S. 544, 547, *modified,* 393 U.S. 919 (1968), and who is further still under obligation—if it is legally possible—to protect his client's interests against the indictment with which he is still charged.

> Though admission to practice before a federal court is derivative from membership in a state bar, disbarment by the State does not result in automatic disbarment by the federal court.

Id. at 547. "Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should not be disbarred." *Theard v. United States,* 354 U.S. 278, 282 (1957). Ample precedent supports the position that Palacios was not automatically disqualified, and that his subsequent services would not, without regard to their intrinsic quality, be deemed "ineffective."

In *United States v. Hoffman,* 733 F.2d 596 (9th Cir.), *cert. denied,* 105 S. Ct. 521 (1984), Hoffman's lawyer, Vernell, a licensed member of the Florida bar, was, during a trial in the district court of Arizona, suspended by Florida from the practice of law for a period of six months, having suffered misdemeanor convictions for failure to file income tax returns,

and because he had counseled two clients to enter guilty pleas and then to challenge their pleas as void due to his conflict of interest in representing them. A local rule for the District of Arizona required an attorney subject to disciplinary action by the bar of another jurisdiction to report that matter to the court. Another rule provided that, upon suspension or disbarment by any court of competent jurisdiction, such attorney would be "forthwith suspended from practice before this court, and [unless upon good cause shown within 40 days], he will be disbarred." D. Ariz. R. 7(c).

Vernell did not inform the court of his disbarment during the trial, and the Arizona district court did not order him disbarred from that forum until a month after his client Hoffman had been sentenced. In a post-judgment petition for relief under 28 U.S.C. § 2255, Hoffman argued that upon his Florida disbarment, Vernell was no longer "counsel" within the meaning of the Sixth Amendment, that the trial judge would have been obligated to suspend him immediately had he known of the Florida suspension, and that he should be deemed to have been disqualified from the time of his Florida suspension. We rejected this argument.

We began in *Hoffman* by noting that the Sixth Amendment guarantee of counsel means assistance by an attorney who has been found qualified to represent a client as evidenced by admission to the bar. *Id.* at 599. But we refused to apply a per se rule that in the federal court, representation by a lawyer suspended from practice by a state bar automatically results in the denial of the Sixth Amendment right to counsel. *Id.* at 601. A defendant must show actual errors and omission by counsel that a conscientious advocate would not have made, and which prejudiced him. *Id.* at 603.

Vernell was in fact reinstated the following year, long after sentence and judgment, but that does not affect the application of the same principle here. *Hoffman* teaches that the fact that an attorney is suspended or disbarred does not, without more, rise to the constitutional significance of ineffective counsel under the Sixth Amendment. Rather, a defendant

must ordinarily point to specific conduct which prejudiced him in order to raise the constitutional claim. To constitute ineffective representation by counsel

> Defense counsel's errors or omissions must reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent criminal defense attorney—they must be errors a reasonably competent attorney acting as a diligent conscientious advocate would not have made, for that is the constitutional standard.

Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (*en banc*) (footnote omitted), *cert. denied,* 440 U.S. 974 (1979). *See also United States v. Butler,* 504 F.2d 220, 223 (D.C. Cir. 1974) (per curiam) (that counsel was not a member of the local bar was not alone sufficient to find the right to effective counsel breached; but significant trial errors and other prejudicial considerations, in addition to nonmembership, warranted remand). The majority in *Hoffman* therefore rejected the view that a presumption of ineffectiveness arises in the trial forum when a lawyer is suspended from practice by his bar state. 733 F.2d at 603-04 (Nelson, J., dissenting).

Our rejection of a per se rule in *Hoffman* was not unprecedented. In analogous situations, other courts have rejected similar per se rules. For example, the Supreme Court rejected the proposition that disbarment in a state results in automatic disbarment in federal court. *Ruffalo,* 390 U.S. at 547; *Theard,* 354 U.S. at 281-82. Disciplinary orders affecting an attorney's bar status do not warrant the application of per se rules. *United States v. Bradford,* 238 F.2d 395 (2d Cir. 1956), *cert. denied,* 352 U.S. 1002 (1957) (right to counsel not violated where defendant was represented in federal court by member of New York bar who had not applied for admission to practice in the federal bar); *accord, Derringer v. United States,* 441 F.2d 1140, 1141 (8th Cir. 1971) (per curiam) (representation by counsel who was member of state bar but not admitted to federal district court did not deprive defendant of effective assistance of counsel).

A defendant's right to effective assistance of counsel would be violated where he is represented by a person posing as a lawyer who had not been admitted to any bar. *E.g., Solina v. United States,* 709 F.2d 160, 169 (2d Cir. 1983) (reversing denial of defendants' motion to vacate conviction where his attorney was a graduate of accredited law school who twice failed New York bar examination and who had never been admitted to any other bar); *Harrison v. United States,* 387 F.2d 203, 212-14 (D.C. Cir. 1967) (conviction reversed because government used defendant's statements from earlier trial in which defendant was represented by ex-convict posing as a lawyer), *rev'd on other grounds,* 392 U.S. 219 (1968). The principle applied in such cases is that one never admitted to practice law and therefore who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute "effective representation of counsel" for purposes of the Sixth Amendment. Conversely, the infliction of discipline upon an attorney previously qualified and in good standing will not and should not transform his services into ineffective assistance.

In a somewhat analogous situation, a decision of the Seventh Circuit is informative. In *United States v. Merritt,* 528 F.2d 650 (7th Cir. 1976), (per curiam) counsel appointed to represent a defendant in an Indiana trial had passed the Iowa bar examination but, unknown to the court, had failed the Indiana examination three times (and therefore was ineligible for a retake until completion of an additional year of study). He had apparently had no prior trial experience. On appeal the defendant claimed ineffective assistance of counsel. The Seventh Circuit said:

> [t]he bar examination failures and the inexperience of appointed counsel create an appearance of inadequate representation that is compounded by the cumulative effect of several incidents which provide reasonable grounds for questioning counsel's professional judgment and skill. Standing

> alone none of these incidents would lead us to conclude that counsel had not met "a minimum standard of professional representation." Under all the circumstances of this case, however, we think that standard was not met.

Id. at 651 (citation omitted). In other words, since the attorney had met the qualifications of a sister state, it could not be said, without looking to the trial record, whether, although not a member of the Indiana bar, he did or did not possess the "minimum standard" to represent a defendant in court. In *Hoffman* we also looked to see whether counsel, despite the Florida suspension, met our requirement of "reasonably competent criminal defense attorney." *Hoffman,* 733 F.2d at 603.

We adhere to our stated standard. Neither suspension nor disbarment invites a per se rule that continued representation in an ongoing trial is constitutionally ineffective. Admission to the bar allows us to assume that counsel has the training, knowledge, and ability to represent a client who has chosen him. Continued licensure normally gives a reliable signal to the public that the licensee is what he purports to be—an attorney qualified to advise and represent a client. But it is an undeniable fact of experience that lawyers unhappily incur sanctions ranging from censure to disbarment; that sometimes that discipline flows from revealed incompetence or untrustworthiness or turpitude such as to deserve no client's confidence. All we need hold here is that a lawyer's services were ineffective on a case, not a per se, basis.

Indeed, Carvajal does not contend, and the record does not show, that the conduct which provoked our order was such as reasonably could be said to have affected or impaired his trial performance. The only suggestion of shortcoming presented by Palacios appears in his failure to communicate the fact of disbarment to the client and to discuss the implications, if any, that might ensue. Carvajal argues the existence of some linkage between the failure to advise him of the disbarment and Palacios' failure to submit a timely

motion on double jeopardy grounds. But there is no explanation of how the omission to submit the motion was, on the record of this case, such an omission as a reasonably competent attorney would not have made, or how the omission prejudiced him. *See Strickland v. Washington,* 104 S. Ct. 2052, 2064-68 (1984) (to make successful claim, a defendant must show that counsel's performance fell below objective standard of reasonableness, identifying such with particularity, and must show prejudice—that but for counsel's errors, the result would have been different).

We therefore hold that the disbarment of Palacios during trial did not violate Carvajal's Sixth Amendment right to effective assistance of counsel. Palacios retained the ability to render effective assistance of counsel to Carvajal at trial, and the record does not show his failure to do so despite his disbarment.

Our holding that Carvajal was not denied effective assistance of counsel is not changed by Carvajal's argument that the district judge was obligated to inform him directly of Palacios' disbarment and to obtain a waiver of Carvajal's right to "effective" counsel. Obviously, full disclosure to the client by counsel of such a happening during trial would make sense and could have settled this entire issue. The district judge recognized this, stating to Palacios, "I think you are under obligation to talk to your client about [the disbarment]."

Carvajal's position is that the trial had to be halted unless he knowingly waived his right to proceed with the same counsel or without counsel. We do understand a trial judge's reluctance to terminate the entire trial, or to wait for a new attorney to familiarize himself with defendant's case. In such a situation, caution, as well as the judge's concern for protection of all those before the court, should prompt the court to make certain that a defendant be informed of so significant a matter which might affect the person's interests. The district judge urged counsel himself to tell his client. Had he followed through, lawyer and client could possibly

have settled all questions between them. But the omission to do so does not constitute grounds for disturbing the conviction.

We also reject the argument that by not informing him of Palacios' disbarment, the trial judge created a conflict of interest between him and counsel. We rejected an analogous argument in *Hoffman* where the defendant claimed counsel's failure to inform the court of his Florida suspension put the two in conflict. 733 F.2d at 601. Instead, we adopted the standard set forth by the Supreme Court in *Cuyler v. Sullivan,* 446 U.S. 335 (1980), for determining when a lawyer's conflict of interest violates his client's right to counsel. A defendant must demonstrate "that his counsel actively represented conflicting interests." *Id.* at 350. In *Hoffman,* we concluded that the defendant failed to show an actual conflict that adversely affected his counsel's performance. 733 F.2d at 602.

The same is true here. There is nothing to indicate that Palacios was so affected by his personal adversity that he was thereafter beset with conflicting interests prejudicial to the conduct of Carvajal's trial, or that he was placed in an adversarial position relative to Carvajal. *Cf. id.* Moreover, it was the district judge who informed Palacios of his disbarment. There was no fraud on the court, and this is not a case where a layman posing as an attorney may risk fear of exposure, as in *Solina,* 709 F.2d at 164. The concern in *Solina* that a layman posing as an attorney might fear that vigorous representation could lead to inquiry into his background and discovery of his lack of credentials is not present here. *See also United States v. Cancilla,* 725 F.2d 867, 870 (2d Cir. 1984) (per se rule that right to effective assistance of counsel violated where, unknown to defendant, trial counsel engaged in activity related to conduct for which defendant was convicted). Nor does this case resemble *United States v. DeFalco,* 644 F.2d 132, 133 (3d Cir. 1979) (en banc) (defendant may have been denied effective assistance of counsel absent waiver, if he was unaware that his attorney,

while representing him on appeal, was under indictment and had accepted a plea bargain in the same federal district court.)

Carvajal suggests that Palacios may have feared "additional disciplinary censorship from the district court," and that this might have prevented him "from competing vigorously with the government before the trial court" on Carvajal's behalf. But the district judge informed Palacios that he had discussed the disbarment with the Chief Judge of the district court, and that both judges agreed to allow Palacios to complete his representation of Carvajal. Thus, under these facts we fail to see "any constraint on counsel's complete and exuberant presentation." *DeFalco,* 644 F.2d at 136. Carvajal's conflict of interest argument is wholly speculative. Neither representation by counsel disbarred during trial, the district judge's failure to inform Carvajal of the disbarment, nor the court's disclosure of the disbarment to Palacios but not Carvajal denied Carvajal the effective assistance of counsel.

V.

The defendants' final argument concerns the propriety of their cumulative sentences on the CCE counts and the substantive predicate narcotics offenses. Both defendants argue that their convictions on predicate narcotics offenses that form the basis for their section 848 convictions are lesser-included offenses. Relying on *Brown v. Ohio,* 432 U.S. 161, 164-70 (1977), and *Jeffers v. United States,* 432 U.S. 137, 150 (1977), the defendants argue that their conviction on the greater CCE offense requires this court to vacate both their convictions and sentences on the lesser-included predicate narcotics offenses. The Supreme Court's most recent pronouncement on the relationship between the CCE offense and the charged substantive predicate narcotics offenses, counsels against the defendants' interpretation of these two cases.

In *Garrett v. United States,* 105 S. Ct. 2407 (1985), the Supreme Court construed the CCE offense as constituting an offense separate from the predicate narcotics offenses.

Similarly, the Court interpreted the intent of the Ninety-First Congress as desiring the imposition of cumulative punishment for the CCE and predicate offenses. Accordingly, we affirm the district court's imposition of cumulative sentences on the defendants' separate convictions for violating section 848 and the separate substantive narcotics violations contained in the indictment.

CONCLUSION

We AFFIRM the defendants' convictions on all counts except for defendant Mouzin's convictions on Counts Eight, Nine, Ten, Eleven, and Thirteen. As to those counts, we REVERSE Counts Eight, Nine, and Thirteen for insufficiency of the evidence and Counts Ten and Eleven for the prejudicial introduction of inadmissible hearsay.

FILED

MAR 18 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

United States v. Carvajal, No. 83-5168

FERGUSON, Circuit Judge, dissenting from Part IV:

I would reverse Carvajal's conviction because his right to Due Process and right to counsel were violated. When a district court and a criminal defense attorney have an *in camera* discussion about the attorney's disbarment and its effect on his continued representation of the defendant, I believe that the defendant has the right to be informed and present. A criminal defendant's constitutional right to be informed that his or her attorney has been disbarred from the trial court in which the prosecution is pending and the court to which any appeal would be made greatly outweighs the majority's concerns of judicial convenience. I must therefore dissent.

I.

On March 15, 1983, this circuit permanently disbarred Carvajal's attorney, Victor Palacios, for failing to meet deadlines in pending appeals, failing to prosecute an appeal, and writing a bad check to a court reporter. *United States v. Cortes-Carvajal,* No. 82-1700 (9th Cir. Mar. 15, 1983). Rule 2.6.2 of the Local Rules for the United States District Court for the Central District of California provides that the district court "shall immediately impose a like order" disbarring an attorney on receiving reliable information that another court or any administrative agency has disbarred the attorney. Despite the rule's language giving automatic effect to disbarment, the district court permitted Palacios to continue practicing before it and complete the trial. When the court learned of the Ninth Circuit disbarment order, the

district judge met with counsel, informed him of the order and the effect of the local rules, and warned him to take some action to appeal the circuit court's order. He further stated that although Palacios would be permitted to continue with the trial, he was "under an obligation to talk to [his] client about it." Despite the court's warning, Palacios did not inform Carvajal of his disbarment.[1]

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[1]Technically, Palacios may not have been disbarred from practicing in the district court because no formal disbarment order was entered despite the court rules' requirements. However, courts have overlooked technical defects in attorney status in right to counsel cases. *See, e.g., Solina v. United States,* 709 F.2d 160, 167 (2d Cir. 1983) ("[W]e do not intimate that any technical defect in the licensed status of a defendant's representative would amount to a violation of the Sixth Amendment."); *Wilson v. People,* 652 P.2d 595 (Colo. 1982) (failure of attorney to take oath for admission to state bar did not constitute ineffective assistance of counsel). Likewise, we should overlook the technical defect in Palacios disbarment status.

Even if the local rules gave the district court the discretion to allow Palacios to continue his representation through the trial, Palacios was a disbarred attorney in all but name. He certainly would not have been permitted to practice before the court on any other matter. Indeed, if it had not been for the ongoing trials the district court likely would have immediately issued the disbarment order required by the local rules. Permitting Palacios to complete the trial might be considered a stay of enforcement of the automatic disbarment; but for purposes of the Constitution, Palacios was a disbarred attorney.

The Majority contends that the district court's action was not unreasonable because there was "an ongoing jury trial of two defendants who were charged with multiple and very serious criminal offenses" and because the trial was at its "closing stages." Slip op. at 27. However, the news of Palacios' disbarment came in the second week of an eight week trial — hardly the "closing stages."

The Majority's characterization of the circumstances underscores the importance of protecting individual rights without regard to our own predelictions of the individual. Constitutional rights do not, and should not, depend on the seriousness of the government's

II.

The most obvious reason for reversing Carvajal's conviction is that his Sixth Amendment right to counsel was violated. The right to counsel contains several guarantees, including the right to competent counsel, the right of a defendant to participate meaningfully in the defense and make important decisions, the right to receive important information, and the right to a loyal attorney, free from conflicting interests. The Majority misanalyzes this case by considering it only as a right to competent counsel situation.

One of the Sixth Amendment's most fundamental guarantees is the right of a criminal defendant to representation by competent counsel. *Strickland v. Washington,* 104 S. Ct. 2052, 2063 (1984); *United States v. Tucker,* 716 F.2d 576, 579 (9th Cir. 1983). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland,* 104 S. Ct. at 2063 (quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 275 (1942)).

Equally important, however, is the defendant's right to participate in the defense. The Sixth Amendment

> does not provide merely that a defense shall be made for the accused; it grants to the accused

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allegations. If anything, the seriousness of the crime charged justifies the need for greater scrutiny of, not greater deference to, trial court errors. *Cf. House v. Balkcom,* 725 F.2d 608, 615 (11th Cir.) (seriousness of charge must be considered in assessing counsel's performance), *cert. denied,* 105 S. Ct. 218 (1984).

In any event, I do not resolve whether the trial court was correct in delaying the enforcement of Palacios' disbarment because I conclude that a client has Due Process and Sixth Amendment rights to be present at an *in camera* discussion of the disbarment issue and to be informed of the disbarment from both the trial and appellate courts.

> personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' and who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'

Faretta v. California, 422 U.S. 806, 819 (1975). The defendant's right to participate in the defense includes the right to make important decisions, such as waiving attorney representation, *see Faretta,* 422 U.S. at 821, and waiving a jury trial, *see United States v. Cochran,* 770 F.2d 850, 851 (9th Cir. 1985) (court must ensure defendant's waiver of jury trial is made voluntarily, knowingly, and intelligently). The need to protect the individual's role in the defense is punctuated by the fact that it is the defendant and no one else who confronts a loss of liberty. *Faretta,* 422 U.S. at 834.

The right to participate in one's defense becomes meaningless without the concomitant right to be informed of important developments in the case. Without information, the defendant cannot make intelligent decisions. Courts have repeatedly recognized the need for meaningful communications between attorney and client. *See, e.g., Geders v. United States,* 425 U.S. 80 (1976) (sequestering defendant during recess between direct and cross-examination improperly interfered with right to counsel); *Mastrian v. McManus,* 554 F.2d 813, 821 (8th Cir.) (recognizing right to private consultation with attorney), *cert. denied,* 433 U.S. 913 (1977); *United States v. Allen,* 542 F.2d 630, 633 (4th Cir. 1976) (right to counsel violated when defendant denied consultation with attorney during recess), *cert. denied,* 430 U.S. 908 (1977). Furthermore, courts have invalidated convictions of defendants incapable of communicating effectively with their attorneys regardless of the strength of the government's case. *See, e.g., Drope v. Missouri,* 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature

and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.").[2]

The constitutional right to counsel also imposes ethical obligations on attorneys. Rules of professional responsibility require an attorney to provide the client with all information needed to make decisions. *See, e.g., Martin v. Texas,* 694 F.2d 423, 425 (5th Cir. 1982) (failure to inform client of right to appointed counsel on appeal constitutes ineffective assistance of counsel); *Gairson v. Cupp,* 415 F.2d 352, 353 (9th Cir. 1969) (failure to inform client of right to appeal constitutes ineffective assistance of counsel); Model Rules of Professional Conduct Rule 1.4; *American Bar Association Standards for Criminal Justice, The Defense Function* § 3.5(a) (1971) ("At the earliest feasible opportunity defense counsel should disclose to the defendant any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him."). The attorney also owes a duty of loyalty to the client. *See, e.g., United States v. Alvarez,* 580 F.2d 1251, 1256 (5th Cir. 1978) ("[W]e have always considered the undivided loyalty of counsel as essential to due process."); *United States v. Jeffers,* 520 F.2d 1256, 1262-63 (7th Cir. 1975) (Sixth Amendment requires not only minimum competency but also "counsel whose undivided loyalties lie with his client"), *cert. denied,* 423 U.S. 1066 (1976). This duty of loyality requires the attorney to place the client's interests above the attorney's personal or monetary interests.

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[2]There are some limitations. For example, the Sixth Amendment is not violated when the defendant's actions raise the barrier to effective communications. *See, e.g., Shaw v. United States,* 403 F.2d 528, 529 (8th Cir. 1968) (defendant's refusal to cooperate precludes ineffectiveness of counsel claim). In addition, some communications would endanger a third party. *United States v. Howell,* 527 F.2d 1373, 1374 (5th Cir.) (prohibiting disclosure of jury bribery investigation to client-defendant not violative of Sixth Amendment), *cert. denied,* 429 U.S. 838 (1976). Any such circumstances are obviously absent in this case.

The Majority reviews Carvajal's claim under the traditional ineffective assistance of counsel standard.[3] The majority thus equates the seriousness of the ethical and constitutional violations involved with a counsel's failure to call a witness, for example, or to object to an improper line of questioning. The right to be informed of disbarment strikes at more fundamental concerns than whether an attorney proved to be "incompetent."[4]

Using the traditional ineffective assistance of counsel standard is inappropriate when the attorney's actions, as here, threaten the foundation of the adversary process. The situation here more closely resembles a question of conflict of interest than one of effective assistance of counsel, because this case does not involve an assessment of whether the attorney performed competently.[5] As the court reasoned in *Alvarez,* 580 F.2d at 1256-57 (footnote omitted):

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[3]Reviews of Sixth Amendment challenges to the effectiveness of attorney representation often involve courts determining the attorney's competence. To avoid second-guessing an attorney's strategic decisions, courts must use a fairly stringent standard for reversing a conviction for ineffective assistance of counsel. For such challenges, the defendant must show (1) "that counsel's performance was deficient" and (2) "that the deficient performance prejudiced the defense." *Strickland,* 104 S. Ct. at 2064.

[4]The Majority concedes that some one never admitted to practice cannot provide effective representation, but asserts that the same reasoning does not apply when one is disbarred. Slip op. at 11. The distinction between a never-admitted attorney and a disbarred one makes little sense. The discipline imposed against the attorney in this case was for failing to protect his client's right to appeal, a classic example of refusing to represent a client's interests. Although Palacios proved that he was sufficiently competent to pass a bar exam, he was utterly incapable of representing his clients. Such proven inability as a lawyer is not required to reverse a conviction under the Majority's reasoning.

But even if the ineffectiveness standard were proper for this case, I would conclude that Palacios refusal to inform his client of the disbarment constituted such incompetence, especially in light of the district court's order to do so.

[5]The Supreme Court noted in *Strickland* that the prejudice

> Unlike *competency* of representation, where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself.

An attorney's refusal to disclose his or her disbarment to the client creates a conflict of interest, rather than being merely ineffective assistance of counsel. Withholding from Carvajal information that Palacios was disbarred so thoroughly violated Palacios' ethical obligations that his representation became meaningless. This nondisclosure, probably more than any other act, illustrates the true allegiance of those attorneys who place their own financial reward above the duties they owe to their clients. This situation presents the worst sort of conflict of interest; attorney deception and self-interest surely destroy the fiduciary relationship with the client. This inherent violation of the Sixth Amendment's right to counsel, present when a person masquerades as a practicing attorney, has prompted the two circuits addressing this issue to adopt per se rules about such attorney conduct. Both courts reversed a conviction under such circumstances, without requiring any showing of prejudice. *Solina v. United States,* 709 F.2d 160, 168 (2d Cir. 1983) (reversing conviction despite overwhelming evidence of guilt); *Harrison v. United States,* 387 F.2d 203, 212 (D.C. Cir. 1967), *rev'd on other grounds,* 392 U.S. 219 (1968).[6] When attorney misconduct is so severe as to offend

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requirement is presumed when there has been "[a]ctual or constructive denial of the assistance of counsel altogether." 104 S. Ct. at 2067. Such a denial occurs when counsel breaches a duty of loyalty owed to the client by representing conflicting interests. *See id.; Cuyler v. Sullivan,* 446 U.S. 335, 345-50 (1980).

[6]The Majority's reliance on *United States v. Hoffman,* 733 F.2d 596 (9th Cir.), *cert. denied,* 105 S. Ct. 521 (1984), is misplaced. The factual circumstances in *Hoffman* are inapposite to this case.

one's sense of justice or is so contrary to the notion of ethical behavior as to completely undermine the trust relationship, reversal of a conviction should be automatic.

The Sixth Amendment guarantees more than a disbarred attorney must perform competently for a conviction to stand. Carvajal had a right to know of conversations between his attorney and the judge. The district court even recognized Palacios' serious ethical obligations and instructed him to inform Carvajal. By not informing his client of the disbarment or his conversation with the district court, Palacios violated Carvajal's Sixth Amendment rights.

Our obligation to uphold democratic principles and justice demand that we reverse Carvajal's conviction. The legitimacy of the adversary system depends on a trusting attorney-client relationship. When we ignore the failure of that crucial

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The attorney in *Hoffman* had been merely suspended from practice by the Florida State Bar for six months; in the decision, this court emphasized the limited duration of the suspension, *id.* at 600. In addition, the client-defendant probably knew of the disbarment. *Id.* at 598 n.2. By contrast, Palacios was permanently disbarred from the Ninth Circuit and the district court, and it is conceded that the defendant did not know of the disbarment order.

Moreover, the attorney in *Hoffman* could not be disbarred by the district court without a separate hearing. The rules in *Theard v. United States,* 354 U.S. 278 (1957), required a hearing prior to disbarment because a state court had suspended the attorney, and therefore prevented the local rules from taking effect automatically. The legal circumstances in this case are quite distinguishable. Whereas the *Hoffman* attorney was suspended by a state court, a fact found crucial in *Theard,* 354 U.S. at 281, Palacios was disbarred by a court in the same judicial system.

Finally, the fact that Palacios had been disbarred by the very court to which the appeal had to be taken is relevant. At the very least, Palacios' refusal to inform Carvajal that he would be unable to represent him on appeal violated his ethical obligations. Any counsel in Palacios' position, even if permitted by the district court to continue through the trial, would have had little incentive to perfect the record on appeal since the appellate court had prohibited him from practicing.

relationship in a particular case, we undermine our entire criminal justice system. The Majority today ignores that Palacios no longer represented Carvajal's interests.

III.

An independent reason for reversing Carvajal's conviction is that his constitutional right to be present at the conference between Palacios and the district judge was violated. The Constitution guarantees a criminal defendant the right to be present at every critical stage of a trial. *See e.g., United States v. Gagnon,* 105 S. Ct. 1482, 1484 (1985) (right guaranteed by Due Process Clause); *Illinois v. Allen,* 397 U.S. 337, 338 (1970) (right guaranteed by Confrontation Clause); *see also* Fed. R. Crim. P. 43. The Constitution guarantees the right of the accused to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *Snyder v. Massachusetts,* 291 U.S. 97, 105-06 (1934).

Of course, a defendant is not entitled to be personally present at every proceeding in the case. In confining the right to be present to critical stages, courts assume that the defendant's attorney will represent the defendant's interests in noncritical proceedings. *See, e.g., United States v. Vasquez,* 732 F.2d 846, 849 (11th Cir. 1984) (no right to be present at bench conference attended by defendant's attorney to discuss cross-examination of defendant); *United States v. Williams,* 4[illegible] F.2d 361, 365 (9th Cir.) (notice of conferences need not be sent to defendant because court assumes attorney represents defendant's interests) (following *United States v. Alper,* 449 F.2d 1223 (3d Cir. 1971)), *cert. denied,* 409 U.S. 857 (1972); *United States v. Jorgenson,* 451 F.2d 516, 521 (10th Cir. 1971) (no right to be present at *in camera* conference on evidence questions when attorney present), *cert. denied,* 405 U.S. 922 (1972).

Due Process thus assures a right of presence unless such presence " 'would be useless, or the benefit but a shadow.' " *United States v. Christopher,* 700 F.2d 1253, 1262 (9th Cir.)

(quoting *Polizzi v. United States,* 550 F.2d 1133, 1138 (9th Cir. 1976)), *cert. denied,* 461 U.S. 960 (1983). Even the ablest attorney cannot replace the defendant at certain critical proceedings, at which the defendant's presence can never be "useless." *See, e.g., Henderson v. Morgan,* 426 U.S. 637, 647 (1976) (defendant must be apprised of charge before guilty plea may be accepted); *Hall v. Wainwright,* 733 F.2d 766, 775 (11th Cir. 1984) (defendant may never waive right to be present in capital case), *cert. denied,* 105 S. Ct. 2344 (1985).

This right includes the right to be present during *ex parte* communications between a judge and the defense counsel that so vitally affect the trial. Discussions about Palacios' disbarment and its effect on his ability to continue representation in the case surely qualifies as such a vital communication.[7] Most important, we cannot assume that the attorney represents the defendant's interests in such a proceeding, or that the defendant's presence would be "useless." A defendant must have the opportunity to attend such a conference.

The violation of a defendant's right to be present at the proceeding does not necessarily require automatic reversal of a conviction. In many situations, appellate courts may affirm a conviction "if in the particular case the defendant's absence was harmless beyond a reasonable doubt." *Miller v. Stagner,* 757 F.2d 988, 995 (9th Cir.), *modified on other grounds,* 768 F.2d 1090 (9th Cir. 1985), *cert. denied,* ___ U.S.L.W. ___ (U.S. Mar. 3, 1986). The harmless error rule does not apply, however, when "societal interest in seeing that the forms of trial are preserved" demands reversal of the conviction. *Badger v. Cardwell,* 587 F.2d 968, 978 (9th

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[7]The conference between Palacios and the district court judge was not a general disbarment proceeding. The conference directly related to the defendant's representation in the pending criminal trial. I do not decide whether a defendant has a right to be present at a disbarment proceeding wholly separate from the underlying criminal matter.

Cir. 1978).[8] For example, courts employ a per se reversal rule when a defendant is absent from the jury selection process, because the defendant has an absolute prerogative to exercise peremptory challenges. *See, e.g., United States v. Washington,* 705 F.2d 489, 497 (D.C. Cir. 1983).

I believe that the present situation warrants automatic reversal. As in the jury selection cases, Carvajal had an absolute prerogative to dismiss his disbarred attorney. Moreover, cases finding harmless error in right to be present cases do so because the court found that the attorneys adequately represented the defendants' interests. *See, e.g., Miller,* 757 F.2d at 995; *United States v. Stratton,* 649 F.2d 1066, 1080 (5th Cir. 1981). Here, not only did Palacios fail to protect Carvajal's rights, but his interests directly conflicted with Carvajal's. I would reverse Carvajal's conviction because his right to be present at the conference between Palacios and the district judge was violated.

The standard that this dissent suggests is neither novel nor cumbersome. It simply recognizes that a client-defendant in a criminal action has the right to be informed that his or her attorney has been disbarred. This right does not require

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[8]We have recognized that the right of presence not only protects the integrity and reliability of the judicial process, but also prevents " 'the loss of confidence in courts as instruments of justice which secret trials would engender.' " *Badger,* 587 F.2d at 978 (quoting *United States v. Gregorio,* 497 F.2d 1253, 1258 & n.10 (4th Cir. 1974)). *Badger* involved a defendant representing himself who was excluded from the courtroom for asking repetitive and irrelevant questions.

The reasoning in *Badger* controls the present case. I can envision few instances in which public confidence in our judicial process will be so severely affected. This case represents a classic situation of a "secret trial"; the district judge and the defendant's attorney decided that the attorney — though permanently disbarred by the Ninth Circuit — would be permitted to continue his representation in the case. Such callous disregard for the defendant's rights in the matter is exactly what the *Badger* court warned against.

any affirmative action on the part of the court, except the duty to ensure that the client has been notified once the court has been informed of the disbarment and to permit the defendant to attend any conferences on the issue. The decision to proceed with disbarred counsel lies with the client. If the client wishes to obtain other counsel, a continuance or mistrial motion may then be appropriate. I do not suggest what standard should govern the trial court's review of such a motion. But I hasten to add that judicial convenience should be a low priority when the right to counsel has been so thwarted.

NO. 83-5168

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs.

ALFONSO CARVAJAL,

Defendant-Petitioner.

PETITION FOR REHEARING IN BANC

APPEAL FROM

THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

INTRODUCTION

This Petition raises a constitutional question of first impression in this Circuit. The Petitioner's appeal was under submission for fourteen (14) months and resulted in a split opinion by the Panel. Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Petitioner respectfully urges that the matter be reheard *in banc*.

This matter involves constitutional questions of exceptional importance:

(1) Whether the Sixth Amendment right to counsel is violated when a defendant is unwittingly represented by a disbarred attorney;

(2) Whether the Fifth and Sixth Amendments are violated when the District Court, upon learning of counsel's disbarment during the early stages of the trial, fails to personally advise the defendant of that fact as well as it's decision to permit his lawyer to continue as counsel of record.

The Panel's inability to agree on whether these foregoing events entitled the Petitioner to a new trial, as evidenced by a vigorous thirteen (13) page dissenting Opinion, also suggest that an *in banc* rehearing is necessary to achieve uniformity within the Circuit on the important constitutional questions raised by the Petitioner's appeal. Indeed, the issues raised by Petitioner's appeal have caused dissent within this Circuit before. *See, United States v. Hoffman,* 733 F.2d 596 (9th Cir.) *cert. denied,* 105 S.Ct. 521 (1964) (Nelson J., dissenting).[1]

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[1]This Petition also parenthetically notes that both the Appellee as well as his co-appellant have also requested rehearings on different issues raised by the majority opinion inthis case.

II

THE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN THE DISTRICT COURT FAILED TO NOTIFY HIM THAT HIS TRIAL COUNSEL HAD BEEN PERMANENTLY DISBARRED BY ORDER OF THE NINTH CIRCUIT COURT OF APPEALS.

A. Facts

Four years ago, Alfonso Carvajal and twenty-one (21) other co-defendants were charged in a multi-count indictment which alleged numerous violations of the laws prohibiting narcotics trafficking and money laundering. These charges included the allegation that the appellant and his co-defendant, Barbara Mouzin committed one of the most serious crimes in the federal code: engaging in a continuing criminal enterprise in violation of Title 18, U.S.C. 848.[2]

In May of 1983, the appellant and five other codefendants began what was to be an eight week jury trial before United States District Judge A. Wallace Tashima. After the second week of trial, the district court notified defense counsel for the petitioner that the Ninth Circuit had permanently disbarred him for repeated instances of failing to effectively represent his clients.[3] Despite the language of Local Rule 2.6.2 of the United States Court for the Central District of California which requires a trial court to "immediately impose (an) order of . . . disbarment" upon receipt of information that a member of its bar has been disbarred by another court,

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[2]This violation is one of the few crimes in the federal code which requires imposition of a mandatory minimum sentence: at least ten (10) years in prison without parole.

[3]The Circuit's decision disbarring Petitioner's counsel cited his "failing to meet deadlines, failing to prosecute an appeal, and tendering a bad check to a court reporter." *United States v. Cortes-Carvajal,* No. 82-1700 (9th Cir., March 15, 1983).

the trial judge allowed the Petitioner's trial counsel to continue his representation of the appellant until the end of the trial.

Notwithstanding the trial court's recognition that the Petitioner's counsel was under an obligation to advise him of his disbarment, its discussion of that disbarment and its decision to allow him to continue the trial work conducted outside the presence of Mr. Carvajal. The Opinion in this case noted the appellee's concession that Mr. Carvajal was not informed of his attorney's disbarment or the trial court's decision with respect to his continued representation at any time during the trial.[4]

After six additional weeks of trial, Mr. Carvajal was convicted and subsequently sentenced to twenty-nine (29) years in prison with a lifetime special parole. Since the imposition of sentence, he has been in custody at the Federal Pennitentiary at Lompoc, California.

B. Majority Opinion

The majority Opinion affirmed the appellate's conviction notwithstanding his attorney's disbarment and the trial court's failure to notify him of that fact using the following arguments:

(1) The trial judge had the discretion to interpret Rule 2.6.2 's call for "immediate disbarment" in such a way as to allow the Petitioner's attorney to act as counsel for an additional six weeks until the conclusion of the case. While the majority agreed that the requirement for immediate disbarment had a "saluatory purpose", it nonetheless felt that the trial court's interpretation was justified by practical exigency: the propect of a mistrial. (See pages 26 and 27 of the *Opinion*).

(2) Assuming that the trial court erred by not immediately disbarring the Petitioner's trial

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[4]See page 8, lines 24-25 of the *Opinion*.

counsel, the majority felt that his continued representation did not render him ineffective within the meaning of the Sixth Amendment.

(3) While the majority opinion felt that "unquestionably" the Petitioner's attorney should have told him about his disbarment so that he "then could have been heard as to his views" it felt that his failure to do so did not create a conflict of interest which deprived Mr. Carvajal of his rights under the Due Process Clause of the Fifth Amendment and Sixth Amendment.

C. Basis for the Rehearing

Circuit Judge Ferguson's dissent asserted that relevant case law and the court's obligation to uphold democratic principles of justice" demanded a new trial for the petitioner on a number of independent grounds.

(1) The Trial Court's Decision to Allow Petitioner's Attorney to Continue His Representation of Mr. Carvajal Without Advising Him of His Disbarment Created A Conflict of Interest Which Violated His Sixth Amendment Right to Counsel.

As Circuit Judge Ferguson noted, the mandatory language of Local Rules 2.6.2 does not allow a trial judge the discretion to defer "immediate" disbarment for any reason. The majority sought to justify the trial court's decision to allow Petitioner's counsel to complete the trial by suggesting that adherence to the "literal" language would have brought about "a litigation disaster." This, in plainer language, would have simply been a mistrial as to the Petitioner. This justification is insufficient for a number of reasons.

First, as previously noted, the Rule does not allow the trial court the discretion which the majority Opinion sought to create.

Second, there is nothing in the record to support the majority's explanation that the trial court *was* exercising its "discretion" because it was afraid of a "litigation disaster." District Judge Tashima simply allowed Petitioner's counsel to continue his representation based upon a conversation with the Chief Judge. The substance of this conversation was never placed on the record.

Third, the majority erroneously claims that a mistrial would have been a "litigation disaster" because the trial was in its closing stages. (See page 27, lines 4-10, of the Opinion). In fact, as Circuit Judge Ferguson pointed out, the trial was in its *beginning* stages when the court confronted the question of Mr. Carvajal's representation. It was during the second week of an eight week trial. (See page 42, fn. 1 of the Opinion). Additionally, the trial court was not reluctant to "plunge the trial into chaos" by declaring a mistrial on March 30, 1983, as to four other co-defendants[5] *in the very same trial* when it decided the jury had heard certain inadmissible evidence. Only one other co-defendant, Barbara Mouzin, remained on trial with Mr. Carvajal when the trial court considered (on April 7th) whether to allow the Petitioner's counsel to proceed. Clearly, Mr. Carvajal simply could have been retried with the others.

Finally, and most importantly, as Circuit Judge Ferguson concluded, "judicial conveniences should be a low priority when the right to counsel has been . . .thwarted." (Page 54, lines 15-16, of the Opinion).

The Petitioner contends that since his trial counsel had no right to continue his representation, his Sixth Amendment protections were implicated when the court permitted him to complete the trial without so advising him. The majority Opinion analyze this question as whether the disbarment of petitioner's counsel rendered him "incompetent" within the meaning of the Sixth Amendment. Yet, the majority Opinion reads the Sixth Amendment protection too narrowly for there

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[5]Oscar Costano, Samuel Schuster, Mr. C, and Mr. Cantelli.

is ample authority for the proposition that that Amendment guarantees not *only* competent representation but also "the right of a defendant to participate meaningfully in the defense and make important decisions, the right to receive important information, and the right to a loyal attorney, free from conflicting interest." See, e.g., *Cuyler v. Sullivan,* 446 U.S. 335, 346-50 (1980). Circuit Judge Ferguson found that trial counsel's "refusal to disclose his . . . disbarment to the client created the worst sort of conflict of interest." (Page 48, lines 16-17 of the Opinion). He further noted that this conflict of interest required reversal without any showing of prejudice (see page 49, of the Opinion, and the cases cited therein).

The majority's reliance on *United States v. Hoffman,*[6] to reject the petitioner's conflict of interest claim is misplaced. In *Hoffman*, the client-defendant knew of the disbarment. *Id.* at 598, fn. 2. Additionally, as the *Hoffman* Opinion emphasized, the attorney was only suspended for a limited duration and not disbarred. Finally, Hoffman's counsel had not been suspended from practice until *after* his representation of the appellate. By sharp contrast, it is conceded that the petitioner in this case did *not* know of his attorney's disbarment which occurred *during* his trial by order of the *same* circuit in which he was practicing. The majority seeks to dismiss the petitioner's conflict of interest claim as "speculative". Yet, inasmuch as the petitioner's attorney continued his representation at the district court's "discretion" (and in the face of a rule requiring immediate "disbarment"), he had *substantial* motivation to refrain from any tactic which might lead the trial court to *either* disclose his disbarment to Mr. Carvajal or invoke the mandatory privisions of Local Rule 2.6.2. The existence of these actively competing interests (the attorney's fear of disclosure or disbarment by the trial court versus the petitioner's interest in a lawyer that will vigorously represent his case) is enough to require a new trial in this case. No specific prejudice need be shown. *United*

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[6]733 F.2d 596 (9th Cir.) *cert denied,* 105 S.Ct. 521 (1984).

States v. Hoffman, supra at 601. As the Court of Appeals reasoned in *United States vs. Alvarez*, 580 F.2d 1251, 1256-57 (5th Cir. 1978):

> "Unlike *competency* of representation where an attorney's conduct may fall anywhere along a continuum ranging from the incompetent to the superlative, conflict-laden representation is not susceptible of such fine gradations. Such representation is invidious, often escaping detection on review, and is tantamount to a denial of counsel itself."

(2) The Court Had a Duty to Personally Address the Petitioner and Obtain A Waiver of His Right to Counsel.

It is the duty of the trial court to ascertain whether a waiver of the constitutional right to assistance of competent counsel is made intelligently, voluntarily and competently. *United States v. Duganovic,* 468 F.2d 182, 186 (9th Cir. 1973). *See, e.g., Badger v. Caldwell,* 587 F.2d 967, 972, n.3 (9th Cir. 1974) (the main instrument for insuring conduct of counsel does not deprive accused of the fair trial is the trial judge).

Because the trial court never informed the petitioner of his right to competent and conflict-free counsel, and never personally inquired of the petitioner whether he had in fact been informed of his attorney's disbarment, the judgment of conviction should be reversed without a showing of prejudice and without regard to evidence of the petitioner's guilt. See *United States v. Aponte,* 591 F.2d 1247 (9th Cir. 1978); *United States v. Gillings,* 586 F.2d 1307 (9th Cir. 1978); *United States v. Saadya,* 750 F.2d 1419 (9th Cir. 1985).

The court's duty to personally inquire of the petitioner as to whether he had been informed of his counsel's disbarment and to obtain a knowing and intelligent waiver arose when the court received the disbarment order. This duty became more apparent when, later in the trial, defense counsel failed to comply with the court's order to timely

submit a written motion on double-jeopardy grounds (R.T. 15/99-100) or submit a motion to dismiss the case pursuant to Rule 29 of the Federal rules of Criminal Procedure despite a court order on May 3, 1983 specifically extending the time in which he could do so. While it may be difficult to reconstruct a merit of these motions had trial counsel made them in a timely manner, his failure to even file them is the very same conduct that caused his disbarment in the Ninth Circuit and surely constituted further grounds for the district court to inquire as to whether or not Mr. Carvajal knew his attorney had been disbarred. Inasmuch as this Circuit indulges in every presumption against a waiver of fundamental rights and will not presume a waiver from a silent record, the trial court's failure to obtain a waiver from Mr. Carvajal, or even notify him of Mr. Palacios' disbarment, must result in a new trial. *Carley v. Cochran,* 369 U.S. 506, 516 (1961); *United States v. Saayda, supra,* at 1420-21. While no particular form of interrogation is necessary to obtain a knowing intelligent waiver, the trial court must assure itself that the defendant understands the charges and the manner in which an attorney can be of assistance. *United States v. Gillings, supra* at 1308.

(3) The Petitioner Had a Constitutional Right Under the Fifth Amendment to be Present at the Conference Between His Attorney and the District Judge Wherein the Disbarment and the Decision With Respect to it was Discussed.

As Circuit Judge Ferguson noted, the constitution guarantees a criminal defendant the right to be present at every critical stage of the trial. *See e.g., United States v. Gagnon,* 105 S.Ct. 1482, 1484 (1985) (right guaranteed by the due process law); *Illinois v. Allen,* 397 U.S. 337, 338 (1970) (right guaranteed by confrontation clause); see also Federal of Criminal Procedure 43. Due Process thus assures a right of presence unless such presence "would be useless, or the benefit by the shadow." *United States v. Christopher,*

700 F.2d 1253, 1262 (9th Cir.), *cert. denied,* 461 U.S. 460 (1983). It is well-settled that even the ablest attorney cannot replace the defendant at certain critical proceedings at which the defendant's presence can never "useless." A defendant therefore has a right to be present at any proceeding where "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend the instant charge." *Snyder v. Massachusetts,* 291 U.S. 97, 105-06 (1934). This right includes the right to be present during *ex parte* communications between a judge and the defense counsel that finally affect the trial. Discussions about a disbarment and its effect on attorneys ability to continue representation of the case qualifies as such a vital communication according to Circuit Judge Ferguson and the cases cited in his Opinion. Circuit Judge Ferguson would not assume that the petitioner's attorney represented his itnerest in such a proceeding or that Mr. Carvajal's presence would have been useless. Therefore, he believed that Mr. Carvajal's situation warranted an automatic reversal since he had an absolute perrogative to dismiss his disbarred attorney which was unable to exercise because of the procedure utilized by the trial court. *See, e.g. United States v. Washington,* 705 F.2d 489, 497 (D.C. Cir. 1983). The cases finding harmless error and the right to be present do so because those courts found that the attorneys adequately represented their client's interest. In Mr. Carvajal's case, Circuit Judge Ferguson found that not only did his trial attorney fail to protect his rights, but his interest directly conflicted with that of his client's.

(4) Palacios' Failure to Inform His Client of The Disbarment Constituted Incompetent Representation Within The Meaning of the Sixth Amendment.

Even assuming that the Sixth Amendment is narrowly read to guarantee only "competent" counsel, (without reference to conflicts of interest), the Petitioner asserts that his attorney's failure to inform him of his disbarment constitutes incompetence. Concededly, Mr. Carvajal's trial counsel was

under an obligation to advise him of the disbarment so that he could make an informed decision as to whether he wished to have him continue as his counsel of record. Moreover, the district court specifically instructed him to advise his client of the Ninth Circuit's order. His failure to meet his obligation, even after being reminded by the trial court, is inexcusable and severly prejudiced his clients right to be represented by an attorney who was authorized to practice. *See e.g., Solina v. United States,* 709 F.2d 160, 164-67 (2nd Cir. 1982); *Strickland v. Washington,* 104 S.Ct. 2052, 2064, (1984).

III

JOINDER

The Petitioner respectfully requests to join in all arguments raised by his co-appellant, Barbara Mouzin, in her petition for a rehearing presently pending before this court.

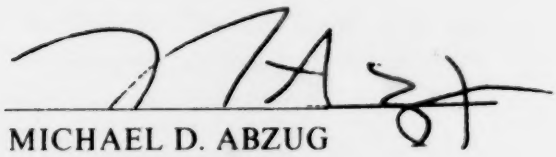
IV

CONCLUSION

For all the foregoing reasons, the Petitioner requests that these issues be reheard *in banc.*

DATED: April 10, 1986

Respectully submitted,



MICHAEL D. ABZUG
Attorney for Petitioner
ALFONSO CARVAJAL

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ _____

_____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matter stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner_____ ☐ a_____ of_____

_____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for_____,

a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on_____, 19__, at _____California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____

Type or Print Name Signature

ACKNOWLEGEMENT OF RECEIPT OF DOCUMENT

(other than summons and complaint)

Received copy of document described as_____

_____

on_____19___.

_____ _____

Type or Print Name Signature

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF

I am employed in the county of LOS ANGELES, State of California. I am over the age of 18 and not a party to the within action; my business address is: 3440 Wilshire Blvd., Ste. 1007, Los Angeles, CA 90010.

On April 11 1986, I served the foregoing document described as PETITION FOR REHEARING IN BANC on the interested parties.
in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

JAMES WALSH, AUSA
U.S. ATTORNEYS OFFICE
U.S. COURTHOUSE
312 N. SPRING ST.
LOS ANGELES, CA 90012

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at APRIL 11, 1986, California.

Executed on_____, 19___, at_____, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
Executed on_____, 19___, at_____, California.

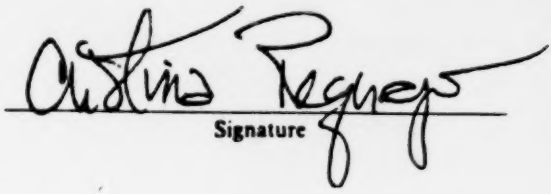
☐ (State) I declare under penalty of perjury under the laws of the State of California that the

above is true and correct.

☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

CHRISTINA REQUEJO

Type or Print Name



Signature

RE[illegible] 1986

FILED

JUL - 7 1986

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, v. ALFONSO CARVAJAL, Defendant/Appellant.	No. 83-5168 D.C. No. CR 82-518-AWT **ORDER**

Before: SNEED, POOLE, and FERGUSON, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Sneed and Poole voted to deny the petition and to reject the suggestion for rehearing en banc. Judge Ferguson voted to grant the petition and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing. An active judge called for a vote on whether to rehear the matter en banc. The request for en banc consideration failed to receive a favorable majority of the votes of the active judges.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on September 5, 1986, I served the within *Petition for Writ of Certiorari* and *Joint Appendix* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

James Walsh
Assistant U.S. Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 5, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)